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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 71-864, 71-865

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Petitioners*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE AND DEMOCRATIC NATIONAL COMMITTEE

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., *Petitioner,*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

QUESTION PRESENTED

Whether the First Amendment permits a policy ratified by the Federal Communications Commission whereby its broadcast licensees sell advertising time to commercial spokesmen but maintain a flat ban on the sale of any such time to persons seeking to present views on controversial public issues.

STATEMENT

Respondent Business Executives' Move for Vietnam Peace (hereinafter "BEM") offers this additional statement to clarify the statement in the government's brief.[1] We specifically seek to make clear which issues were not before the court below, the limited nature of that court's decision, and the status of rulemaking proceedings presently pending before the Commission.

A. BEM'S ATTEMPT TO PURCHASE TIME

Respondent BEM is an organization of over 2,700 business executives from 49 states. It believes that the Vietnam war and its underlying policies are antithetical to the interests of the United States including its free enterprise system and economic well-being. Its members are responsible members of their respective communities; BEM does not as a rule engage in newsworthy acts, such as mass demonstrations or civil disobedience, to attract attention to its views. As the court of appeals noted, BEM depends "instead, on [its] ability to get a hearing—as full as possible and as direct as possible—from the general public" (App. 449).

BEM sought to purchase a 60-second segment of Washington, D.C. radio station WTOP's advertising time to broadcast the antiwar statements of prominent retired military leaders, businessmen, and scientists

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[1] Hereinafter cited as "U.S. Br." The brief of Petitioner Post-Newsweek Stations, Capitol Area, Inc. is cited hereinafter as "WTOP Br."; the brief of Petitioner American Broadcasting Companies, Inc. (No. 71-866) as "ABC Br."; the brief of Petitioner Columbia Broadcasting System, Inc. (No. 71-863) as "CBS Br."; and the *amicus curiae* brief of National Broadcasting Co., Inc. as "NBC Br."

(App. 298-306).[2] WTOP holds out for sale to commercial advertisers 18 of every 60 minutes it is on the air. The purchasers of 60 second segments of "spot" advertising time include Dr. Scholl's Foot Deodorant, Manishewitz Wines, and Bayer Aspirin. See Appendix A hereto. Yet WTOP refused to sell any advertising time to BEM. WTOP's reason was not that BEM's views were irresponsible, obscene, unnecessary or lacking in taste, but, instead, that:

> it is the policy of [WTOP] radio and television stations not to sell spot announcement time to individuals or groups in order to set forth a point of view on any controversial issue of public importance (App. 297).[3]

To BEM, WTOP's advertising time seemed an ideal forum in which to communicate its views to the federal government and the public. WTOP had precisely the audience BEM wanted to reach. In its promotional brochures, WTOP beseeches advertisers to present messages in their own words to a radio audience that includes "[m]ore members of Congress . . . than [the audience of] any other radio station,"[4] an audience

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[2] BEM's spot announcements contain statements by Rear Admiral Arnold E. True (ret.), Brigadier General William W. Ford (ret.), Mariner Eccles, former Chairman of the Federal Reserve Board, and Dr. Gerald Wald, a Nobel Prize winning biologist (App. 298-308).

[3] In subsequent pleadings before the Commission and the court below, WTOP did allege that it had presented views similar to those of BEM. But this allegation was in the context of responding to BEM's fairness doctrine complaint, which is not a subject of this action. As to the refusal to sell time, WTOP relied *solely* on its flat ban against selling time for the discussion of controversial issues. Indeed, as is more fully discussed below, (pp. 23-24) one of the petitioners' primary objections to the ruling of the court below is that it would allow speakers to present views on issues *not* being covered by the licensee.

[4] WTOP promotional brochure (Appendix B, hereto), p. 7.

some of whose members have "special kinds of Washington interests, [who] will open their minds to your special messages or campaigns which speak to large public issues."[5] Moreover, the cost was far below that of a comparable effort in any other medium. WTOP's rate card shows that $100 would purchase one minute of class AAA time, i.e., prime radio time,[6] and allow BEM to reach 46,000 listeners.[7] During other hours, the number of listeners that could be reached per dollar expended was even greater.[8]

B. PROCEEDINGS BEFORE THE COMMISSION

BEM asserted before the Federal Communications Commision that WTOP's flat ban on the sale of time for editorial advertisements violated the public interest

Monday to Saturday; Class AA time is

[5] *Id.* at 13.

[6] *Standard Rate and Data Service, Inc.*, Vol. 54, No. 6. Each day is split up into several time periods. For WTOP, Class AAA time is 6:00-10:00 AM, Monday-Friday from 3:00-7:00 PM, and Saturday from 10:00 AM to noon; and Class A time is all other time periods. The size of the listening audience will vary at different times within each class. For example, Class A period 10:00 AM-3:00 PM Sunday reaches about 28,000 people while Class A period 7:00 PM to midnight reaches about 16,000 listeners. The cost of purchasing advertising time is apparently determined not only by the size of the audience, but by its demographic composition and buying habits as well. An advertiser presumably picks its time buys based on when the type of listener it wants to reach is most likely to be listening. See text and note following this note.

[7] *American Research Bureau Radio Estimates.* January 13-February 9, 1972. The rate card cost of one minute of Class AA time, reaching about 25,000 people, is $75, while Class A time, which reaches between 10,000 and 34,000 people, depending on the particular time segment involved, is $45 for one minute.

[8] See note 7, *supra.*

standard of the Communications Act and the First Amendment's free speech guarantee. In addition, it asserted that WTOP had violated the fairness doctrine in its coverage of the war (App. 291-296, 320-326, 346-348).

Several months after BEM complained of WTOP's action to the Commission, the Democratic National Committee ("DNC") sought a declaratory ruling that a "broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues" (App. 15). In response, two of the three major radio and television networks revealed that with respect to editorial advertisements, they employed policies similar to WTOP's. Except for sales to political candidates, ABC would not sell advertising time for expressing controversial views absent special public interest considerations (App. 42-46).[9] CBS would sell no advertising time for the discussion of controversial issues (App. 58-80).[10] NBC simply stated that it has no policy which prevents it from selling "program time" to a "major national political party during non-campaign periods" to discuss public issues (App. 47).

The Commission ruled against both BEM (App. 357 *et seq.*) and DNC (App. 247 *et seq.*) on the same day in separate but cross-referenced opinions. Although there was no evidence of any harm to WTOP if it carried BEM's editorial advertisements — indeed WTOP never asserted it would suffer any injury— the Commission sustained WTOP's flat ban on editorial

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[9] See also ABC Br. at 7-8.

[10] See also CBS Br. at 7.

advertisements. It stated that a licensee's obligations under the fairness doctrine "to present *representative* community views on controversial issues . . ." (App. 367) was adequate under both the public interest standard and the First Amendment (App. 266) to implement our "profound national commitment that debate on public issues should be uninhibited, robust, and wide open" (App. 259). The Commission noted that Section 3(h) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 153(h), declares that broadcasters are not "common carriers." It implied that to require any broadcaster to sell *some* of its spot advertisement time to *someone* at *sometime* might be inimical to this provision (App. 366-67).

In *DNC*, the Commission employed essentially the same reasoning, in an opinion cross-referenced to BEM. (App. 269-73). It further held that it would be arbitrary and contrary to the public interest for a licensee to refuse to sell time to the DNC or other significant political parties for the purpose of soliciting funds[11] (App. 269-73).

To summarize the Commission's holdings: a licensee that regularly allocates time for sale to commercial sponsors need not sell any of that time to groups wishing to present editorials on controversial issues. A licensee must sell spot announcement time to a significant political party to raise money but not to discuss controversial issues. However, a licensee need not sell any time to other groups either to discuss controversial issues or to raise money.

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[11] No party below sought review of this determination and its rectitude is *not* before this Court.

C. THE DECISION OF THE COURT OF APPEALS

BEM and DNC each filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.[12] On August 3, 1971, the court of appeals issued a single opinion reversing the Commission's orders in both *BEM* and *DNC*. Relying on *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), Judge Wright, writing for himself and Judge Robinson,[13] stated that editorial advertisements are an important form of speech (App. 473-74). An "unbroken line of authority" (App. 475) has held that, once the operators of public forums have opened them to speech, they may not discriminatorily bar controversial speech (App. 478).

On First Amendment grounds, the court struck down the flat ban policy under challenge.[14] It left undisturbed all other aspects of the regulatory scheme:

> Under attack here is a common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "noncontroversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this country." We disagree. The actual

[12] BEM did not contest the Commission's fairness doctrine ruling.

[13] Judge McGowan dissented.

[14] The court later noted that a policy of excluding editorial advertisements on issues which a broadcaster had fully and fairly covered in its programming (see p. 3 note 3, *supra*, and accompanying text) might be more defensible than a flat ban (App. 471).

> case before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme*[15] form of control which totally excludes controversial public debate from broadcast advertising time.
>
> We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted (App. 448-49), (footnote omitted).

Because this case came to the court below from an administrative agency charged with primary regulatory responsibilities in this area, an agency which may draw upon its own expertise and that of its licensees, the court did not order that BEM's or DNC's or any other specific group's advertisements must be accepted by any broadcaster.

> We do not hold, however, that the planned announcements of the petitioner—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees (App. 449).

Rather it confined itself

> to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air (App. 449).

The court made clear that "broadcast time is necessarily limited" (App. 467). Thus non-discriminatory paid access to the broadcast media is a "reasonably regulated 'abridgeable' " right (*Id.*)—that is, a "*limited*" right to speak (App. 453).

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[15] Emphasis in original, this footnote added.

D. THE COMMISSION'S ACCESS INQUIRY

On June 11, 1971, almost two months before the decision of the court below, the Commission issued a *Notice of Inquiry in Docket 19260, Study of Fairness Doctrine,* 30 F.C.C. 2d 26, 36 Fed. Reg. 11825. The Commission's stated purpose was "to institute a broad-ranging inquiry into the efficacy of the fairness doctrine and other Commission public interest policies, in light of current demands for access to the broadcast media to consider issues of public concern." *Notice of Inquiry, supra,* 30 F.C.C. 2d at 26. Citing *New York Times Co.* v. *Sullivan, supra,* the Commission expressly noted its concern with First Amendment as well as purely statutory interests. *Id.* at 27.

Part IV of the Inquiry sought comments on access to the media for the discussion of public issues. *Id.* at 33. Citing its decisions in *BEM and DNC*, the Commission stated that it had rejected the concept of a paid right of access because "there is neither Constitutional nor statutory right for any individual or group to present their views, and as a matter of policy it would not serve the public interest to act as if there were." *Ibid.*[16]

On August 3, 1971, the court of appeals rendered its decision reversing the Commissions rulings in *BEM* and *DNC*. The mandate of the court was issued on October 22, 1971. On February 7, 1972, after this Court initially refused to stay the mandate of the court below, the Commission, in compliance with that mandate, released a *Further Notice of Inquiry*, 33 F.C.C. 2d 554, 37 Fed. Reg. 3383, soliciting comments for the purpose of developing guidelines governing broadcaster acceptance of editorial advertisements.[17] However, when this

[16] The government devotes considerable attention to the *Inquiry*. See U.S. Br. at 13-15, 18-20, 60.

[17] The specific issues to which the public was asked to address are set out in the Government's Brief at 18, n.7.

Court subsequently did stay the mandate of the court below, the Commission, on March 3, 1972, issued an *Order and Further Notice of Inquiry*, 33 F.C.C. 2d 798, 37 Fed. Reg. 4980, withdrawing the February 7, 1972, *Further Notice of Inquiry* on the ground that "[t]he matters raised in that Notice must await decisions by the SupremeCourt. Our action in this respect must be taken in the context of definitive resolution by that Court of the basic issues of the case." *Ibid.* Thus, in the pending proceeding the Commission has limited its scrutiny to "the non-Constitutional aspects [of the original, June, 1971, *Notice of Inquiry*] which may differ greatly from the issues posed in the Further Notice and now withdrawn." *Id.* at 798-99.

SUMMARY OF ARGUMENT

This case raises the question whether the federal government may permit broadcast licensees to discriminate against speech on the basis of its content. The court of appeals ruled that the First Amendment prohibits broadcasters, who routinely sell advertising time to commercial spokesmen, from flatly refusing to sell such time to spokesmen for controversial issues. In doing so, the court neither created a new right to speak, nor dictated a new scheme of broadcast regulation. It simply held that the arbitrary discrimination against "controversial" speech within the existing regulatory scheme cannot stand.

I. The First Amendment prevents the government from restraining speech for any but the most compelling reasons. The petitioners do not even pretend that compelling reasons exist to justify restraints on controversial advertising. Indeed, there can be no legally sufficient reasons to warrant discrimination against all controversial speech because of its content.

A. The refusal of broadcasters to sell advertising time to spokesmen for controversial issues—while selling such time to commercial spokesmen—discriminates against speech solely because of its content. This Court affirmed again last Term that the First Amendment prohibits such discrimination. *Police Dept. of City of Chicago* v. *Mosley,* —— U.S. ——, 92 S.Ct. 2286 (1972).

Further, the discrimination here works against the precise values that the framers of the First Amendment expected to protect. It grants commercial speech a preferred status in the market-place of communications vis-a-vis "editorial" or controversial speech. If anything, commercial speech should enjoy less, not more scope than political speech. See *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). Instead, the broadcasters have turned the First Amendment upside down by subordinating the very kinds of controversial speech that this Court has scrupulously protected.

Finally, discrimination in the broadcasting media does not even purport to rest on a neutral basis. It does not operate to exclude all controversial spokesmen even-handedly, but selects one—the licensee—who arrogates for himself the right to speak for all the others. It permits the "trustees" of the nation's most influential communications media to freely pick and choose among ideas, broadcasting only those *they* find to their liking or which *they* judge the public *ought* to hear.[18]

B. Compliance with the fairness doctrine—and its obligation to cover controversial *issues*—does not entitle broadcasters to discriminate against the controversial speakers.

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[18] The broadcaster petitioners all indicate in their briefs that they wish to retain the right to exclude from the airwaves issues which, in their view, are "inappropriate" (ABC), "insignificant," "trivial," "unsuitable" (CBS), beyond . . . good taste" (NBC), or "narrow," "slight" (WTOP).

Editorial advertising serves First Amendment values that the fairness doctrine cannot satisfy. It permits the speaker to select a subject the broadcaster might not otherwise air. It allows the speaker to control its timing, its format, its content and its presentation. Indeed, controversial spokesmen have at least the same need to speak for themselves that commercial advertisers are provided.

Broadcasters operate uniquely important forums for speaking to mass audiences. Voluntarily selling time to commercial advertisers, they cannot now claim that the advertising mode of speech is somehow inappropriate to their forum.

The fairness doctrine requirement of balanced journalistic coverage of some issues is not an adequate substitute for editorial advertising. A process in which a handful of governmental licensees are given exclusive control over all controversial speech—what issues to cover, which spokesmen to permit on the air, what format to employ—does not generate the diversity and robust debate which the First Amendment requires in a free and open society.

II. The fairness doctrine was not designed, nor has it traditionally functioned, to supplant individual editorial speech. To the contrary, the doctrine arose in cases which sought to assure that licensees would air all sides of important controversial issues by selling or giving individuals time to discuss the issues directly.

III. The elimination of discrimination against controversial paid editorial announcements will not disrupt the broadcasting system. The wealthy need not dominate all available time. Licensees need not suffer financial sacrifice. Government need not supervise broadcaster decisions any more than it now does under the fairness doctrine. And broadcasters will not be

treated as "common carriers" and forced to accept a plethora of editorial advertisements. The court below simply held that, as to airtime which broadcasters *elect* to market to others, flat discrimination against controversial speech is constitutionally impermissible.

IV. There is sufficient state action in the present case to invoke the protections of the First Amendment. Three elements, in particular, combine to implicate the government in the discriminatory policies of the broadcasters.

For one, the entire scheme of broadcast regulation has created a complicated and detailed interdependency between the Commission and its licensees. The licensee receives a governmental grant of property (the airwaves) in the nature of a leasehold. As a condition of that license or lease, stations are required to operate in the public interest in a manner consistent with the First Amendment. See *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

Further, the Commission, by its rulings in *BEM* and *DNC,* has given official government approval to the discriminatory policies of the broadcasters. Those policies are no longer individual "private" decisions. Rather, the Commission has given notice that it finds those policies perfectly consistent with the scope of public responsibility in broadcasting. The government has taken a broadcaster policy and made it its own.

Finally, the public airwaves are too important a forum for speech to escape the protections of the First Amendment. Like sidewalks and parks, they are inherently part of the public domain. Broadcasters, acting for their own interests, cannot appropriate that forum for themselves without subjecting themselves to public responsibility.

ARGUMENT

I. A FLAT REFUSAL TO SELL ADVERTISING TIME TO SPEAKERS WITH "CONTROVERSIAL" VIEWS BY A BROADCASTER WHO GENERALLY SELLS SUCH TIME FOR COMMERCIAL VIEWS WAS CORRECTLY HELD BY THE COURT BELOW TO COMPRISE UNCONSTITUTIONAL DISCRIMINATION.

The First Amendment recognizes that "speech" is not a right to be conferred or withheld by law, but a fundamental "freedom" which inheres in all citizens. This freedom of course is not absolute. It is protected only against governmental incursions and must often be balanced against other constitutional interests—the right of a private homeowner or club to privacy, or a municipality's need to keep its streets clear for traffic. But "the preferred place given in our scheme to the ... freedoms secured by the First Amendment . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). Governmental curtailments of protected speech "must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Ibid.*[19]

Suppression of particular speech because of its *content,* however, is emphatically *not* a legitimate governmental interest. The First Amendment was conceived to stop the government from picking and choosing between ideas, selectively suppressing those it found objectionable, and letting others pass. That Amendment must invalidate a "policy" that silences only the self-

[19] Compare *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), holding that the Government cannot impose even "incidental" restrictions on speech without advancing an "important or substantial governmental interest" which is "unrelated to the suppression of free expression" and no greater than "essential to the furtherance of that interest."

initiated editorial speech that a governmental licensee deems "controversial."

A. THE FIRST AMENDMENT BARS DISCRIMINATION AGAINST CONTROVERSIAL SPEECH.

The Commission and its licensees seek to perpetuate a highly discriminatory scheme for allocating that limited portion of its airtime which a broadcaster *elects* to market to advertisers. A licensee must accept fund raising spots for "significant" political parties (App. 272), but may reject them from smaller parties and voluntary organizations like BEM. It may sell time to political candidates to discuss controversial issues, but may refuse to sell BEM time to discuss the same issues. Licensees may present their own controversial views in a short editorial format,[20] yet flatly refuse to sell BEM, DNC and all other members of the public any time in the same format.

Finally, a licensee which accepts paid advertisements for commercial speech, may refuse to sell time for *controversial* speech.[21] If one wishes to speak about the

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[20] The Commission even encourages licensees to use this editorial form. See *Report on Editorializing*, 13 F.C.C. 1246 (1949); cf. 47 C.F.R. §§ 73.123, 73.300, 73.679 (1972).

[21] Licensees, nevertheless, often sell time for controversial *commercial* speech. Although the Commission ruled that cigarette commercials comprised "controversial" speech (*Cigarette Advertising (WCBS-TV)*), 9 F.C.C. 2d 921, *aff'd, Applicability of the Fairness Doctrine to Cigarette Advertising*, 10 F.C.C. 2d 16 (1967), *aff'd, Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)), most licensees continued to sell cigarette manufacturers time. And although advertisements for high-powered automobiles and gasolines also raise controversial environmental issues of public importance (*Friends of the Earth* v. *F.C.C.*, 449 F.2d 1164 (D.C. Cir. 1971)), licensees today continue to sell their manufacturers time. But see CBS' disclaimer (CBS Br. 41). See also *Wilderness Society and Friends of the Earth*, 30 F.C.C. 2d 643 (1971) (NBC ads on "controversial" Alaskan pipeline; *Center for Auto Safety*, 32 F.C.C. 2d 926 (1972) (ABC and NBC ads on "controversial" automobile air-bag safety device).

merits of mouthwash, beer or automobiles, in other words, the broadcaster's door is open; but if one desires to speak about hunger, consumer exploitation or the war, the door slams shut. This discrimination based solely on the content of speech is constitutionally unacceptable.

Such selective discriminations against "controversial" speech bear a heavy presumption of invalidity.[22] The First Amendment was designed to restrain the Government from rummaging through the thoughts and beliefs of its citizens, approving those it favored, suppressing those it opposed. And although there may be legitimate governmental interests in regulating the time, place and manner of speech in public forums,[23] the *content* of the speech,[24] its controversiality,[25] or even its intensity,[26] cannot be the determining factors.

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[22] It goes without saying, of course, that the term "controversial" is "extraordinarily vague" (App. 479).

[23] See, e.g., *Adderly* v. *Florida*, 385 U.S. 39 (1966) (demonstration in jail courtyard).

[24] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago* v. *Mosley*, U.S. , , 92 S. Ct. 2286, 2290 (1972). The Court of appeals below also cautioned, "The content of the idea which the excluded speakers seek to promote is — emphatically — *not* permitted as a distinguishing factor in itself" (App. 477). See also *Danskin* v. *San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P. 2d 885 (1946).

[25] See, e.g., *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) (demonstration on State House grounds); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949) (harsh language).

[26] See, e.g., *Saia* v. *New York*, 334 U.S. 558 (1948); *Wollam* v. *City of Palm Springs*, 59 Cal. 2d 276, 379 P. 2d 481 (1963); 29 Cal. Rptr. 1; compare *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

As the court below acknowledged, First Amendment law governing the access of speakers to particular forums is an exercise in balancing their protected interests in speech against the extent to which other legitimate forum uses may be disrupted (App. 476). In the typical case, speech interest of the government are weighed against certain *non*-speech interests such as discipline in public schools,[27] the legislative process in a state capitol,[28] or the tranquility of a public library.[29] In the case of broadcasting, however, there are no non-speech interests to be balanced against individual speech.[30] Rather, the speech rights of individuals and licensees seeking to share the same speech forum must be balanced against each other.

Where the forum has already been opened to speech in the form of advertising or "commercial editorials," however, and where the Government and its licensees selectively bar only "controversial" speech in editorial form, the arguments advanced to justify this pervasive form of discrimination are invalid for two reasons. First, the Government's arguments for singling out and suppressing only "controversial" advertisements cannot be weighty if they are waived selectively for commercial and non-controver-

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[27] *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969).

[28] *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Edwards* v. *South Carolina, supra.*

[29] *Brown* v. *Louisiana*, 383 U.S. 131 (1966).

[30] The airwaves, after all, are dedicated solely to speech purposes. The Communications Act of 1934 requires the "fair, efficient, and equitable distribution of *radio service.*" 47 U.S.C. §307 (b) (1964) (emphasis supplied).

sial advertisements.[31] Having opened a portion of his airtime for sale to mercantile members of the public, the licensee cannot maintain that the advertising mode is inherently disruptive or an unsatisfactory technique for speech by outsiders. Second, selective waivers indicate the government has let slip the blindfold of neutrality and seeks to "pick and choose among the views it is willing to have discussed."[32] It seeks not to regulate, but to censor. Such action is constitutionally impermissible.

The court below applied this analysis to broadcasters' bans on controversial editorial speech. After leaving "open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort" (App. 475), the court stated:

> [T]he issue in these cases is the permissibility of discrimination, within a given block of advertising time, against 'controversial' speech and in favor of commercial and 'non-controversial' speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public (App. 475).

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[31] If Government states its intent to prevent littering in the public parks, for example, yet allows the Rotary Club but not the Jehovah's Witnesses to leaflet, then its "littering" justification must be rejected as insubstantial. See *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939).

[32] *Cox* v. *Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). Where the Government or its licensees selectively admit some speech and bar only "controversial" speech, "the rationale for regulation is fatally impeached. The objection can then no longer be keyed to other uses of the public places [e.g., the broadcast forum], but would appear to implicate the kind of message that the groups were transmitting. The regulation would thus slip from the neutrality of time, place, and circumstance into a concern about content." H. Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 29.

The court then noted that the licensee itself had essentially conceded or "waived" its argument that editorial advertising was an unsatisfactory mode of speech in the broadcast forum.

> By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.
>
> The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself (App. 477).

This Court has recently applied the same analysis in a highly analogous case. *Police Dept. of City of Chicago* v. *Mosley,* ___ U.S.___ , 92 S. Ct. 2286 (1972), struck down an ordinance which permitted "peaceful picketing of any school involved in a labor dispute," but prohibited picketing or demonstrating for any other reasons on the streets and sidewalks within 150 feet of a school. *Id.* at 2288. Under both the Equal Protection Clause and the First Amendment, the Court observed that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or *more controversial views.*" *Id.* at 2290 (emphasis supplied). It may "not select which issues are worth discussing or debating in public facilities.... Once a forum is opened up to assembly or

speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone." *Ibid.*[33]

Here, too, the broadcast forum has been opened not merely to speech, but to commercial speech in an *editorial format.* Here, too, the use of that forum has been denied to those wishing to express "more controversial views" in the same format. Here, too, unconstitutional exclusions from a public forum have been "based on content alone."[34]

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[33] In the face of such clear constitutional doctrine, one can hardly take seriously the government's major argument that "[i]f, as in this case, a court decides in favor of such an affirmative regulatory policy solely in terms of what it divines from the First Amendment, then the Commission is ousted from its role of deciding how the public's interest in broadcasting can best be promoted and Congress is rendered powerless to change the court's result." (U.S. Br. at 34.) Agency (or indeed legislative) "policy" which promotes unconstitutional discrimination against speech cannot stand. That is the rationale and result of such cases as *Mosley* and *Cox.* v. *Louisiana, supra;* administrative and legislative "policy" preferring labor picketing to other controversial speech was summarily struck down.

[34] As both this Court, *Mosley, supra,* at 2290, 2291 & n.5, and the court below (App. 478) noted, regulatory discriminations between speech messages based on their content have been condemned without exception. See, e.g., *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951). In the more typical case, a vague statute or ordinance has granted administrative officials excessively broad discretion to suppress selectively the speech of those they dislike. Statutes conveying such broad discretion have also been struck down. See, e.g., *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969); *Cox* v. *Louisiana, supra; Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Saia* v. *New York,* 334 U.S. 558 (1948).

The court below cited a consistent line of authority in striking down content-based discrimination against controversial advertising. Four federal courts and two state supreme courts have unanimously agreed that once a forum utilized for speech has been opened up for commercial advertising, a ban on "controversial" advertising is unconstitutional unless clearly justified by a "clear and present danger."[35] In the leading case, *Wirta* v. *Alameda-Contra Costa Transit Dist.*,[36] the California Supreme Court struck down a ban against the sale of advertising space in municipal buses for controversial causes. Characterizing the issue as one "in which a governmental agency has refused to accept an advertisement admittedly protected by the First Amendment for display in a forum which the agency has deemed suitable for the expression of ideas

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[35] *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (1969), aff'd, 441 F.2d 1257 (1971) (school newspaper); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (school newspaper); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967) (advertising in subway station); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 W. 63, 455 P. 2d 350 (1969) (advertising in municipal buses); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P. 2d 982, 64 Cal. Rptr. 430, 68 Cal. 2d 51 (1967) (advertisements in municipal buses).

For similar cases involving other modes of speech in public forums, see, e.g., *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (armbands in public school); *Wolin* v. *Port Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1969) (leaflets in bus terminal); *Trujillo* v. *Love*, 322 F. Supp. 1266 (D.C. Colo. 1971) (state college newspaper); *Danskin* v. *San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P. 2d 885 (1946) (public school buildings); *People* v. *St. Clair*, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968) (public subway platform).

[36] 68 Cal. 2d 51, 434 P. 2d 982, 64 Cal. Rptr. 430 (1967). The *Wirta* decision was cited with approval by this Court in *Mosley*, *supra*, at 2291 n.5, and 2292.

through the medium of paid advertisements" (*Id.*, 434 P. 2d at 985), the court ruled:

> [D]efendants, having opened a forum for the expression of ideas by providing facilities for advertisements on its buses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection. *Id.*, 434 P. 2d at 985.

The court condemned as "a most pervasive form of censorship" a policy that "chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning others." *Id.* at 986. Petitioners in the present case seeks to perpetuate an identical form of censorship. They cannot justify this censorship of non-commercial speech without a more "compelling" argument than mere "administrative convenience." See *Wirta, supra.*[37]

If any doubt remains that their policies are designed to implement a discriminatory scheme of unrestrained censorship, the broadcaster petitioners' own words quickly put them to rest. They all assure the Court

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[37] Petitioners seek to avoid this conclusion by arguing that their close supervision of the content of commercials prevents their "interests" in this speech from being outweighted by a countervailing need for *some* editorial speech. (U.S. Br. 51-52; ABC Br. 51-52; CBS Br. 41; WTOP Br. 45, 51.) This argument misses the point. Although licensees may indeed supervise the content of commercials to some extent, many are nonetheless broadcast. Commercial spokesmen for Dermasage Skin Lotion and Manischewitz Wines in fact *do* buy up to 18 minutes of WTOP's time each hour to speak to the merits of their products. If commercial advertisers can, under some circumstances, select the message, words, format, time of day, and audience for their message, then BEM should be given the same opportunity.

that controversial speech will flourish under their benevolent supervision.[38] Behind this benign facade, however, the broadcasters reveal their true colors.

ABC wants to reject controversial speech whenever its "content has either a marginal level of public interest or is in some respects offensive or inappropriate" (ABC Br. 13). It would exclude editorial announcements it considers "misleading, scandalous, indecent and 'crackpot' . . . inflammatory, hateful, 'frivolous' and . . . questionable" (ABC Br. 52, 53-54). CBS will reject controversial views that are "insignificant," "can be presented in some more effective fashion," are "trivial," "unduly inflammatory, offensive or otherwise unsuitable for broadcasting into the home" (CBS Br. 34, 40). NBC wishes to bar advertisements which stray "beyond the bounds of normally accepted taste," or address issues which have already been "adequately presented" (NBC Br. 10). And WTOP would protect the public from "propaganda campaigns" and subjects which are "slight, parochial or inappropriate" (WTOP Br. 31).

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[38] WTOP claims, for example, that under the fairness doctrine it will "select and balance subjects, formats, and speakers for the very purpose of assuring that a significant variety of different important issues and competing viewpoints are effectively presented" (WTOP Br. 22). ABC claims licensees have "the responsibility to choose . . . what issues should be covered, what manner of presentation is most appropriate and what spokesmen are best suited to present the various sides of such issues" (ABC Br. 44). CBS states that the "fairness doctrine requires broadcast licensees to cover significant public issues, and to present contrasting views on those issues" (CBS Br. 33). NBC suggests there is no evidence to prove "that the public has been denied access to the widest range of views as to controversial subjects" (NBC Br. 20).

Thus, the censorship issue is clearly posed. Petitioners would have this Court ratify a policy which permits broadcasters to censor from their airwaves all issues and spokesmen regarded by *them* as lacking sufficient public importance or merit to reach the ears and eyes of listeners and viewers. Yet such an approach is the antithesis of the word and spirit of the First Amendment. As noted by the court below, "the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a 'free market' in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way" (App. 469).

Flagrant discrimination against such partisan speech was properly held to violate the First Amendment.

B. THE TREATMENT OF "CONTROVERSIAL" ISSUES UNDER THE FAIRNESS DOCTRINE DOES NOT ELIMINATE UNCONSTITUTIONAL DISCRIMINATION AGAINST SELF-INITIATED AND SELF-CONTROLLED EDITORIAL SPEECH.

Petitioners fall back on an unusual argument apparently designed to paper over the obvious discrimination inherent in their flat ban on all "controversial" editorial speech. There is "no invidious discrimination" against controversial views, the Government contends, because the licensees *themselves* "devote substantial air time to . . . controversial issues of public importance" (U.S. Br. at 53). The existence of the fairness doctrine, moreover, is held up as the public's guarantee that broadcast licensees will cover all controversial issues "worthy" of coverage, will do so in a robust and vigorous manner, and in so doing will

obviate the need for any editorial advertising in the broadcast media.

There are two fundamental defects in this approach. First, it badly misconceives and underestimates the importance of direct, self-initiated and self-edited speech, especially in a broadcasting forum substantially controlled by a handful of governmental licensees. Second, it seriously overrates the ability of balanced journalistic coverage of certain issues to satisfy fully the public's right to receive "suitable access to social, political, esthetic, moral, and other ideas and experiences" on radio and television. *Red Lion, supra,* 395 U.S. at 390.

1. There is an important need for direct, self-initiated and self-edited individual speech in the broadcast media.

Although the First Amendment plainly protects "freedom of speech," petitioners argue, instead, that the First Amendment, as it applies to broadcasting, protects only the public's interest in *hearing* about certain issues.[39] In over 200 pages of briefs, petitioners nowhere address the basic First Amendment policy safeguarding freedom of *speech* by individuals or groups. By sleight of hand, they would convert the First Amendment into the following:

> Congress shall pass no law . . . abridging the right of the public to hear about issues.

Even had the founding fathers been foolish enough to adopt this formulation, no showing has been made that the interposition of a journalistic middleman between speakers and the listening public will guarantee the public full exposure to the "widest possible dis-

[39] See, e.g., ABC Br. 22-24; CBS Br. 22; WTOP Br. 19-24.

semination of information from diverse and antagonistic sources." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

The genius of the First Amendment is that it has always defined what the public ought to hear by permitting speakers to say what they wish. Thus, it is no answer for petitioners to attempt to discriminate against speech by noting that the First Amendment protects the public's right to *"receive"* information. The crucial question is whether the government, through a process of "authoritative selection" of issues, speakers, and format, can define that right so narrowly as to foreclose speech initiated and controlled by individuals. This Court has repeatedly answered that question in the negative. It has found that the only way to assure adequate reception of views is to safeguard the right of individuals and groups to speak as freely as possible.[40]

For example, in stating that

> [t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967),

this Court was not engaged in idle rhetorical exercise. Rather, it stressed the constitutional importance of the

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[40]In *Marsh* v. *Alabama,* 326 U.S. 501, 505 (1946), this Court held that the "preservation of a free society is so far dependent on the right of each individual to receive such literature as he himself might desire that a municipality could not, without jeopardizing that vital individual freedom prohibit door to door solicitation of literature. *Martin* v. *Struthers,* 319 U.S. 141, 146, 147."

mode of speech to assure that debate on public issues will be "uninhibited, robust, and wide-open". *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 270. The First Amendment, then, is served by opening up forums to individual speakers as much as is possible. Its emphasis lies with reducing the power of those few individuals or corporations whose actions or policies *decrease* the diversity of the marketplace. In Justice Jackson's view:

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. *Thomas* v. *Collins,* 323 U.S. 516, 545 (1945) (concurring opinion).

Basic First Amendment principles are not compatible with the suggestion that broadcast licensees should function as authoritative middlemen, picking and choosing which ideas they think the public should hear, and rejecting those it should not.

Moreover, the First Amendment's wisdom in unequivocally protecting *speech* safeguards the vital interest in assuring "self-fulfillment [of expression] for each individual," *Mosley, supra,* —, U.S. at —, 92 S. Ct. at 2290.[41] "[S]peech concerning public affairs is

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[41] *Amicus* NBC, the licensee of many broadcast stations, manifests a disquieting hostility to the individual's liberty of free speech: "Whatever may be the psychotherapeutic rewards of self-fulfillment, they have little to do with the First Amendment. The core purpose of the First Amendment, after all, is not that of soothing the ruffled ego of a speaker unable to find a forum to his liking." (NBC Br. at 18.)

more than self-expression." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).

The court below thus correctly disposed of petitioners' arguments by finding that "[i]t is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way" (App. 467-468).

This Court has specifically recognized that the advertising mode is an important vehicle for First Amendment speech. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Court set aside a libel judgment against a newspaper resulting from an editorial advertisement it had printed, stating:

> Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise *their freedom of speech* even though they are not members of the press. . . . [Citations omitted.] The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' [42]

BEM lacks ownership or control of the press or of broadcast facilities. Editorial advertisements there-

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[42] *New York Times, supra*, at 266 (emphasis supplied). Mr. Justice Brennan recently expanded this point in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), stating:

> It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the *individual's* interest in access to the press. . . . 403 U.S. at 47 n.15 (emphasis supplied).

fore offer it a unique opportunity to communicate its message to a mass audience. Moreover, as opportunities for self-expression increase, the diversity of views available to the public will correspondingly grow.

In many respects, the advertising mode of speech is unique. Unlike all other opportunities for public speech through the mass media, advertising allows the individual to choose his own topic, pick the timing of his message, initiate debate on a particular topic, and most importantly, exercise complete creative control over the content of his statement. The choice of spokesman, script, photography, lighting, setting, on-camera talent, even sound effects are the "crucial controls" (App. 468) placed in the speaker's hands. Its concentrated form, its capacity for repetition, and its impact on the listener make editorial advertising "a special and separate mode of expression, not simply a duplication of other expression on the same medium" (App. 468-69).[43]

Two recent cases have prohibited school newspapers from restricting "editorial" expression to their news or letters-to-the-editor columns. *Lee* v. *Board of Regents of State Colleges,* 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd,* 441 F. 2d 1257 (7th Cir. 1971), and *Zucker* v. *Panitz,* 299 F. Supp. 102 (S.D.N.Y. 1969).

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[43] Peter Drucker, the noted sociologists, has observed: "Few messages are as carefully designed and as clearly communicated as the 30-second television commercials . . . . Few teachers spend in their entire teaching careers as much time or thought on preparing their classes as is invested in the many months of writing, drawing, acting, filming, and editing one 30-second commercial . . . . [I]t conveys accessible information, clear image, and perfect comprehension. It is . . . perfect 'learning' in its methodology . . . ." P. Drucker, *The Age of Discontinuity* 336-37 (1970).

In both cases, the courts emphasized the unique importance of the advertising mode:

> It is readily apparent that a paid advertisement can be cast in such form as to command much greater attention than a letter to the editor Large type, photographs, repeated publication and full pages of space are some of the modes of expression available in an editorial announcement that might not be available in a letter to the editor. *Lee, supra,* 306 F. Supp. at 1101.

This makes clear that relegating all controversial speech to journalistic coverage hardly comports with the free speech interests inherent in editorial advertising.

WTOP's flat ban on the sale of time for controversial editorial speech contrasts dramatically with the speech opportunities it affords its paying customers. WTOP turns over 30 percent of all its airtime, or 18 minutes every hour, to commercial sponsors who pay for the opportunity to broadcast their message in their own way.[44] WTOP markets this airtime like the vendor of any other commercial product.[45] Its customers include airlines, coffee, banks, wine, cookies, skin lotion, gasoline, batteries, and a host of other goods and services.[46] In many instances the sponsor prepares his message on record or tape in advance and merely supplies it to WTOP. Sophisticated sound equipment and other creative devices can thus be used

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[44] See Appendix A, *infra.*

[45] One expert has observed: "[T]he communications industries . . . consist of commercial enterprises, not public service institutions . . . . They sell advertising in one form or another, and they bait it principally with entertainment. Only incidentally do they collect and disseminate political intelligence." V.O. Key, *Public Opinion and American Democracy,* 378-79 (1961).

[46] See Appendix A, *infra.*

at the sponsor's leisure. Whereas a soapbox orator or pamphleteer can at best reach hundreds during an hour, stations like WTOP can reach hundreds of thousands of listeners spread across an entire metropolitan area within a few minutes.[47] It is for precisely this reason that BEM selected WTOP as the appropriate medium through which to convey its views on the war issue. Ironically, the importance and controversiality of its message were the sole features that denied BEM's speech access to WTOP's forum.

The almost total monopolization of paid editorial time by commercial advertising is strikingly perverse. Although the First Amendment generally protects "political" speech but not "commercial" speech,[48] the Commission and its licensees permit commercial salesmen to speak about the merits of their own goods—yet deny a comparable opportunity to persons wishing to speak on the burning issues of the day.[49]

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[47] WTOP's own promotional literature stresses the importance of the forum it offers. According to WTOP, "no other medium can react to changing events . . . ." (Appendix B, *infra*, at p. 4.) Its audience is "sophisticated about news reporting" (*Id.* at p. 5), and "[m]ore members of Congress regularly listen to WTOP than to any other radio station." (*Id.* at p. 7.) WTOP concludes: "WTOP non-stop news is not soothing syrup. Listeners deliberately *select* it on their dials, deliberately listen to it, react to it, become *involved* with it." (*Id.* at p. 13.) It was for these reasons that BEM sought to purchase editorial time from WTOP.

[48] See, e.g., *Breard* v. *Alexandria*, 341 U.S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942); *Pollak* v. *Public Util. Comm'n.* 191 F.2d 450, 456-57 (D.C. Cir. 1951), *rev'd on other grounds*, 343 U.S. 451 (1952); See generally Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191 (1965); Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 Sup. Ct. Rev. 191, 208-09.

[49] Surprisingly, the Commission makes an exception for spot announcements by major political parties designed to raise money —a close parallel to commercial advertising (App. 269-273).

Having examined these factors, the court below concluded that the vehicle of editorial advertising was unusually powerful and thus particularly appropriate for individual speech (App. 468-74). On the other hand, the *licensee's* interest in this time is not strong (App. 465). The advertising time sold by WTOP and other licensees, in an important sense, was relinquished to others for *their* direct and substantially unedited[50] speech. The sponsor does not ask the licensee to speak *for* him, as speakers with controversial messages must do under the fairness doctrine. He controls the entire message himself. In the allocation of advertising time, therefore, "the broadcasters have no such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak" (App. 465).[51]

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[50] Stations can, of course, edit or reject advertisements that are false and misleading, although the Commission will not normally review a station's judgment "whether particular broadcast advertisements are false and misleading," *Consumers Ass'n of District of Columbia*, 32 F.C.C. 2d 400, 405 (1971), and asks licensees only to make their own "good faith" "reasonable" judgments in this area. *Id.* at 407. Licensees may also reject advertisements they consider in "poor taste," although even this criterion is flexible. See P. Dougherty, *Advertising: TV Will End a Ban*, N.Y. Times, June 29, 1972, p. 66 (advertising of "sanitary napkin, tampon and douche products" will start on stations subscribing to the NAB Advertising Code).

[51] *See Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582 (D.C.D.C. 1971), *aff'd per curiam*, 40 U.S.L. Week—(U.S., Mar. 28, 1972), in which the court of appeals concluded that the Congressional ban on cigarette advertising had "no substantial effect on the exercise of petitioners' [licensees'] First Amendment rights . . . . [P]etitioners, themselves, have lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages. See, *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, 450 F.2d 642 at 654 (D.C. Cir. 1971)

The Commission and its licensees have created a policy for allocating advertising time which systematically discriminates against "controversial" speech. Confronted with an unbroken chain of precedents striking down precisely such forms of discrimination, they argue that the allegedly comprehensive programming of the broadcast licensees is somehow sufficient to eliminate the discrimination. The argument quite obviously fails. The use of the advertising format and mode is a unique and important vehicle for First Amendment rights. It has been developed and perfected by commercial interests over the years, and acknowledged by them to constitute a highly effective mode of communication. Absent a "compelling" justification, the Commission and its licensees cannot deprive BEM and other small organizations of at least some opportunity to *pay* for the privilege of editorial speech through the media.

2. The fairness doctrine is not a sufficient substitute for editorial expression

The Government argues that the fairness doctrine requires broadcasters to "devote substantial air time to fair and balanced presentation of controversial

.... [The Act] does not prohibit them from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their First Amendment rights." *Id.* at 584.

The Commissions's rules even permit licensees to sell entire blocks of time to "time brokers" who, in turn, re-sell the time to individual advertisers. See 47 C.F.R. § 1.613 (c) (1972). At least one station has "brokered" 15 out of its 32 weekly hours to an outside programmer, thereby relinquishing control of more than 50% of its time. *Metropolitan Broadcasting Co.*, 8 F.C.C. 557 (1941). See also 47 C.F.R. § 1.613(e) (1964) (sales of bulk time up to four hours a day). Presumably such stations could also argue, along with petitioners, that they could legitimately relinquish control over their facilities only to those who eschew "controversial" programming.

issues of public importance" (U.S. Br. 53). However, sole reliance upon the broadcaster's journalistic judgment as to which controversial issues and views shall reach the air is, on its face, inconsistent with the First Amendment values of diversity outlined above. The broadcaster is given total power to determine what the public hears, using his own "good sense" to select "subjects," "format," "different shades of opinion to be presented," and "spokesmen for each point of view." He will determine whether a given subject is "worth considering" and, even if so, whether it has already received "sufficient" broadcast time. *Report on Editorializing,* 13 F.C.C. at 1251-1252; See also U.S. Br. at 47-48.

"Authoritative selection" is thus the synonym of the licensee's "journalistic" judgment. Speech by others may be permitted, but only on the broadcaster's terms. If his speech is rejected, the editorial speaker has no recourse outside of the fairness doctrine to achieve redress. And application of the fairness doctrine itself may not assure him an opportunity to speak since the licensee may decide that someone else is the "more appropriate spokesman for the particular point of view" (U.S. Br. 47) or ban the view entirely.

As discussed *supra* (pp. 25-33), reliance on fairness alone is basically at odds with the concept of self initiated speech enshrined in the First Amendment. Instead of "robust, wide-open debate" among speakers on controversial issues, the listener or viewer receives the broadcaster's simulation of a debate, in which he has chosen the speakers, the format, the timing and the content. The journalist-broadcaster necessarily acts from his own perspective, with his own

peculiar biases, and in response to pressures from both advertisers and his audience. In short, he can hardly be the perfect censor of what the public ought to hear.

Apart from theory, broadcast journalism has not, in recent years, met with uniform praise. Judge Tamm, for example, concurring in *Hale* v. *F.C.C.*, 425 F.2d 566, 574 (D.C. Cir. 1970), citing *Violence and the Media* [A Staff Report to the National Commission on the Causes and Prevention of Violence] 81-82 (1969), observed:

> The commonsense suspicion that this creeping growth of media cartels and conglomerates is likely to produce even more bland and homogeneous intellectual fare than that which is currently available on the mass media was recently confirmed by a study which found that "[t]o limit audience alienation, large circulation media prefer to report ideas of factual stories that are either inoffensive or on which there is relatively broad agreement or wide acceptance."

And the *Report of the National Commission on Civil Disorders,* Ch. XV, pp. 210-211 (1968) stated that the mass media

> have not communicated to the majority of their audience—which is white—a sense of the degradation, misery and hopelessness of living in the ghetto. They have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of—and thus have not communicated—a sense of Negro culture, thought, or history. . . . We believe that most news organizations do not have direct access to diversified news sources in the ghetto. Seldom do they have a total sense of what is going on there.

It is not necessary to condemn broadcast journalism in categorical terms to illustrate the deficiencies inherent in relying *solely* upon it as the determinant of those views and voices the public can hear and those it cannot. Although broadcasters often perform commendable journalistic service, they, like most of us, are not omniscient. The "ghetto" is just one part of society to which they do not have full access, and this alone indicates why persons and public groups must, if at all possible, have some right of access to the broadcaster's airwaves and audience.

Although the fairness doctrine specifically requires licensees to seek out and cover issues of controversy and public importance, *United Broadcasting Co. (WHKC)*, 10 F.C.C. 515 (1945); see *Red Lion, supra,* 395 U.S. at 377, the Commission has never revoked a license for excessively bland or non-controversial programming. In part because such a standard is inherently difficult to enforce,[52] the Commission essentially lacks the tools necessary to supervise a licensee's performance under the fairness doctrine. Left the discretion to eschew controversy, therefore, many licensees have done so with a vengeance.[53] Offers to purchase

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[52] As the court below noted, "the obligation to give 'full' coverage to controversial issues" is "inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to 'seek out' issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues" (App. 470).

[53] "Broadcasters, both individually and in concert have traditionally avoided controversial programming because sponsors are hesitant to become even subliminally associated with opinions disagreeable to potential purchasers." Note, 54 Cornell L. Rev. 294, 296 (1969). One DuPont advertising executive has commented:

spot advertising time have been rejected.[54] Attempts to secure free and paid air time have regularly been rejected, guests "blipped off" interview shows, and controversial subjects otherwise "avoided."[55]

"All these critics forget the point of the TV show—to bring in extra customers. If you alienate one prospective customer with your TV show, it's a flaw commercially no matter how successful it is artistically." S. Opotowsky, *TV: The Big Picture*, 84 (1961). See also, Note, *The Wasteland Revisited*, 17 U.C.L.A. L. Rev. 868, 879 (1970); E. Barnouw, *A Tower in Babel* (1966), and *The Golden Web* (1968); F. Friendly, *Due To Circumstances Beyond Our Control*, 92 (1966); N. Johnson, *How to Talk Back to your Television Set*, 81-96 (1970); and H. Mehling, *The Great Time-Killer*, 42 (1962).

[54] Recently, the three television networks refused to sell time to Allstate Insurance for spot advertising demonstrating the effectiveness of the air bag auto safety device. Several networks felt the commercial was "controversial," would require them to present the other side under the fairness doctrine, and refused to sell the time, even after Allstate agreed, if necessary, to pay for the presentation of contrasting viewpoints. *Broadcasting Magazine*, July 31, 1972, p. 24; "Allstate Says 3 TV Networks Refused to Show Commercial Praising Air-Bag," *New York Times*, July 26, 1972, p. 61.

[55] NBC and CBS have refused to sell spot announcement time to a labor union seeking to communicate its views on a labor settlement to its millions of members. *Communications Workers of America*, 31 F.C.C. 2d 841 (1971). WTOP, in fact, cites this precedent as an example of the need to bar "slight, parochial, or inappropriate" views from air time, and concludes that such "demands" for air time do not "foster confidence in a laissez-faire approach to broadcast programming" (WTOP Br. 31). A Florida station also refused to sell time to a labor union to explain its views on a pending strike. *Amalgamated Meat Cutters*, 25 F.C.C. 2d 279 (1970); see *Retail Store Employees Union, Local 880* v. *F.C.C.*, 436 F. 2d 248 D.C. Cir. 1970) (refusal to sell time reversed). The three networks and WTOP-TV refused to sell time for a documentary opposing the admission of mainland China to the United Nations. *Committee of One Million*, 33 F.C.C. 2d 545 (1971). Congress' Commission on

Exclusive reliance upon broadcasters' journalistic wisdom will not, has not and cannot assure that the public will be exposed to the "widest possible dissemination of information from diverse and antagonistic sources", *Associated Press* v. *United States, supra,*

Population Growth sought to purchase network time to discuss the population explosion and was turned down. *Washington Post,* Feb. 2, 1972, p. A-4. Common Cause was not allowed to purchase network time for a program rebutting the Administration's views on Vietnam. *Washington Post,* Style Section, May 20, 1971. On May 26 and June 15, 1970, a group of 14 U.S. Senators was denied the right to purchase network time to reply to the President on the Vietnam War. *Committee for the Fair Broadcasting of Controversial Issues,* 25 F.C.C. 2d 283, 286 (1970). Consumer-oriented "public service announcements" urging Chevrolet owners to effect repairs on defective engine mounts were rejected for network broadcast. The networks also refused to broadcast announcements disputing the claims of analgesic advertisements. *Broadcasting Magazine,* July 24, 1972, p.19. The networks have refused to permit 13 U.S. Congressmen to air a self-produced documentary on racial problems. *Washington Post,* Feb. 3, 1971, p. A-3. The host on NBC's "Today Show" terminated an interview with George Jessel when he sardonically described two leading newspapers as "Pravda." *George Jessel,* 31 F.C.C. 2d 847, 850 (1971). Commissioner Nicholas Johnson's criticisms of drug advertising on CBS' "Merv Griffin Show" were deleted prior to broadcast. *N. Y. Times,* Sept. 3, 1971, p. 47. ABC refused to broadcast a college football half-time program attacking "war, racism, and pollution" because it had "definite political implications." *Variety,* Nov. 18, 1970, p. 50. Radio station KCBS in San Francisco terminated President Nixon's "Anaheim" address on violence when it concluded the speech was "political." CBS blanked out its television picture of Abbie Hoffman on the "Merv Griffin Show" when he appeared in a "flag shirt" in order "to avoid affronting" viewers. *N. Y. Times,* Mar. 29, 1970, p. 65. ABC deleted the comments of a folk singer on the "Dick Cavett Show" when she criticized the conduct of the "Chicago Conspiracy Trial." *Conq. Richard L. Ottinger,* 18 P & F Radio Reg. 2d 1031, 1036 (1970). CBS blipped out remarks made on the "Tonight Show" by a guest critical of one of CBS' TV affiliates. *N. Y. Times,* Mar. 14, 1969. A television station in Hartford deleted portions of a talkshow guests's comments on the ground that they

326 U.S. at 20. Broadcaster decisions as to which issues or views are "trivial" or "unduly inflammatory, offensive or otherwise unsuitable for broadcasting" (CBS Br. at 40) or "slight, parochial or inappropriate" (WTOP Br. at 31) will inevitably filter out of the marketplace of ideas many attempts to speak before the public will have the opportunity to judge the merits.[56] Yet if the public never hears those views, it, as well as the would-be-editorial speaker, suffers irreparable loss.

A right of *some* direct editorial speech in the broadcase media can significantly ameliorate these problems in several regards. New issues will be brought to public attention and the level of controversy surrounding them may increase or become more focused. Dissident voices on issues already aired will be heard, often adding new dimensions to the public debate. And the unique views of each speaker will be accurately communicated because he will be able to identify himself, speak in his own words and format, and exercise con-

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violated the station's ban on "astrological" material. *Ms. Alexandra Mark*, F.C.C. 72-278 (Mar. 23, 1972). A Los Angeles TV station blipped out the words of writer Mark Lane when he made specific allegations concerning war crimes, *Mark Lane*, F.C.C. 72-6594 (July 19, 1972). WTOP's sister station in Jacksonville, Florida, WJXT-TV, reportedly fired a newsman because he caused advertising account cancellations. *The Nation*, Nov. 9, 1970, p. 455. A newsman was fired from a Pennsylvania station, reportedly because he named local stores (which were also station sponsors) that were violating the price-freeze guidelines. *Evening Star*, Dec. 27, 1971, p. A-9.

[56] Cf., *Saia* v. *New York*, 334 U.S. 558, 559 (1948), which struck down on First Amendment grounds an ordinance forbidding the use of sound amplifiers except for "public dissemination . . . of items of news and matters of public concern . . . provided that the same be done under permission obtained from the Chief of Police."

trol over the timing and context of his message. In short, broadcasting will more closely resemble a forum in which "robust, wide-open debate" can take place. Members of the public will not be forced to rely solely on licensee's broad discretion, hoping that the licensee will present their views, and not ignore or reject them as "slight, parochial or inappropriate" (WTOP Br. 31). To paraphrase the Court in *Tinker* v. *Des Moines School Dist.*, citizens in our system

> . . . may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are *officially approved* . . . [They are entitled to] freedom of expression of their own views. 393 U.S. at 511 (emphasis supplied.)

The limited access opportunity for editorial speech mandated by the court below will expose listeners to more than "officially approved" views.

II. THE FAIRNESS DOCTRINE WAS DESIGNED AS A SUPPLEMENT TO, NOT A SUBSTITUTE FOR, SELF-INITIATED EDITORIAL SPEECH.

Petitioners argue at some length, not only that the fairness doctrine exhausts the need for individualized speech in the broadcast media, but that Congress intended the fairness doctrine to preempt editorial speech altogether. The Government goes so far as to argue that the free speech rights of individual citizens vis-a-vis the broadcast media require Commission recognition and *enforcement* before they can come into existence, and require implementive "policy" decisions which the courts should allow the Commission to make. (U.S. Br. 31, 45.)

Whatever force these arguments might muster in cases not involving unconstitutional discrimination against "controversial" speech, they derive no support from the fragments of legislative history and fairness rulings selectively culled by petitioners. The Congress has never clearly stated its intentions concerning access of editorial speech to the broadcast media. However, to the extent conclusions are justifiable, direct editorial speech has long been an integral component of the "public interest" based broadcast scheme. Indeed, it can be said with some force that the fairness doctrine itself was forged in a series of decisions that struck down attempts by licensees to exclude editorial speech.[57]

Prior to 1927, "[t]he allocation of frequencies was left entirely to the private sector, and the result was chaos." *Red Lion, supra,* at 375. Ruinous interference, poor technical quality and overlapping frequencies forced the broadcast industry to call for government intervention. In 1927 Congress enacted the Radio Act of 1926, 44 Stat. 1162, and in 1934 transferred many of its provisions to Title III of the Communications Act of 1934, Stat. 1064, as amended, 47 U.S.C. § 151 *et. seq.* (1964) (hereinafter "the Act").

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[57] We should note, that even were this not the case, an unconstitutional discrimination against controversial speech could not be justified on the ground that Congress or a governmental agency desired it. *See Mosley, supra; Cox* v. *Louisiana, supra.*

In addition, the government cannot point to the Commission's pending *Inquiry* (pp. 9-10, *supra*) as a basis for this Court avoiding the constitutional issue at hand (see U.S. Br. at 60). Not only would that constitute an unsound approach to constitutional litigation, but the Commission has specifically excluded from its rulemaking the constitutional issue before the Court. See *Order and Further Notice of Inquiry, supra,* 33 F.C.C. 2d at 798-799, quoted *supra,* at p. 10.

The government retained ownership of the airwaves (47 U.S.C. § 301). Broadcast licenses would be granted, and renewed, only where the licensee's programming served the "public interest, convenience, and necessity." See 47 U.S.C. §§ 307(a), 309(a), 310(b) (1964). The Act sought to "secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943).

Congress very early realized that a broadcast licensee's exclusive three-year franchise conferred considerable power to propagandize the licensee's own views and exclude others.[58] The Act was therefore designed to reduce the danger that "in the absence of governmental control, the public interest might be subordinated to monopolistic domination in the broadcasting field." *F.C.C.* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 137 (1940).

The early regulatory steps taken by the Commission, therefore, were designed to *limit,* not increase, the licensee's power to exclude the views of others.

The Commission took its first administrative step toward the "fairness doctrine" in *Great Lakes Broadcasting Co.* v. *Federal Radio Commission,* 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds,* 37 F.2d 993 (D.C. Cir. 1930), cert. dismissed, 281 U.S. 706

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[58] During the debates over the future of radio regulation, Secretary of Commerce (and later President) Herbert Hoover warned that there must be "something more than naked commercial selfishness" in broadcasting. Fourth National Radio Conference 7-8 (Nov. 9, 1925), quoted in J. Coons, *Freedom and Responsibility in Broadcasting,* 96 (1961). Congressman White, the floor manager of the 1927 Radio Act, explained it was intended to ensure that "the broadcasting privilege will not be a right of selfishness" but would instead "rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926). Congressman White repeated in 1934, "The right to broadcast is to be based . . . not upon the selfish desire of the individual." 68 Cong. Rec. 2579 (1934).

(1930).[59] It ruled that the "public interest requires ample play for the free and fair competition of opposing views" in porgramming addressed to "public questions." *Great Lakes, supra,* at 33. The Commission did not expressly address the question whether these "opposing views" could be presented through *paid* editorial announcements or programming. It did suggest, however, that "opposing views" would be presented by individual speakers over the licensee's airwaves:

> [P]articular doctrines, creeds, and beliefs must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public *the microphone will undoubtedly be available.* If it is not, a well-founded complaint will receive the careful consideration of the Commission. *Great Lakes, supra,* at 34 (emphasis supplied.)

It was not clear that *advertising* space was used to express editorial opinions.[60] Advertising itself was held

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[59] At the time of the *Great Lakes* decision, stations had various ways of meeting their public interest obligations. "Propaganda stations" broadcast principally religious or other special interest programs. "General public-service stations" presented "well-rounded" entertainment and public affairs programming. *Great Lakes,* at 34. Some purchased prepared programs; others produced their own and sold their sponsorship to commercial concerns. Spot advertisements were used, but comprised less than half of all advertising time.

[60] At the time of the Radio Act of 1927, "[r] adio advertising was . . . mentioned as an almost peripheral topic. At this juncture the time-selling stations were still in a minority . . . ." E. Barnouw, *A History of Broadcasting in the United States: A Tower in Babel,* Vol. 1, p. 200 (1966). The predominant form of advertising was sponsored shows, in which the advertiser merely identified his name with the program. *Id.* at 158, 237. In 1928 the President of NBC told a Senate Committee that it clients neither described products nor named prices over the air, but relied instead on "good will" from identifying their name with popular programs. Id. at 237. By 1932, however, spot advertisements comprised 40 per cent of all radio advertising. *Id.* at 239.

in generally low regard, and stations occasionally jeopardized their licensees merely by broadcasting "direct" advertisements mentioning *price*. See generally, *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433 (1963) (Brennan, J., concurring).

In *United Broadcasting Co.*, (WHKC), 10 F.C.C 515 (1945), the Commission significantly expanded the *Great Lakes* doctrine. There, a labor union challenged a station's license renewal because of its "policy not to permit the *sale* of time for *programs* which solicit memberships, discuss controversial subjects, race, religion, and politics" was "throttling free speech" and violating "the public interest."[61] *Id.* at 516. Following a hearing, the licensee offered the following policy statement for Commission approval:

> Station WHKC will make time available, primarily on a sustaining basis, but also on a commercial basis, for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof, in order that broadcasting may achieve its full possibilities as a significant medium for the dissemination of news, ideas, and opinions. And, in doing so, *there will be no discrimination* between business concerns and nonprofit organizations either in making time available or restricting the use of such time. Nonprofit organizations will have the right to

[61] The station had patterned its policy after the provisions of the Code of the National Association of Broadcasters, which provided that "no time shall be sold for the presentation of public controversial issues . . . and that solicitation of memberships in organizations, whether on paid or free time, should not be permitted except for charitable organizations . . . ." *United Broadcasting, supra*, at 516. WHKC's policy was remarkably similar to WTOP's policy in the instant case, *supra* at p. 3.

> purchase time for solicitation of memberships. *United Broadcasting, supra,* at 517. (Emphasis supplied.)

The Commission accepted the revised policy as "fair and *nondiscriminatory*" (*Id.* at 518, emphasis added). Stating that the "Communications Act of 1934 requires radio to be an instrument of free speech," the Commission held that licensees had a "duty . . . to maintain an overall program balance by providing time on a nondiscriminatory basis for discussion of public controversial issues. . . ." The contrary view would "impose the views of the licensee upon the material to be broadcast." [62] *United Broadcasting, supra,* at 517, 518.

The Commission reaffirmed its position the following year. In *Robert Harold Scott,* 11 F.C.C. 372 (1946), a petitioner complained that local stations had attacked "atheism" yet "refused to make any time available to him, by *sale* or otherwise," for presentation of opposing views. Once again, the Commission strongly rejected the licensee's

> . . . rigid policy that time shall be denied for the presentation of views which may have a high degree of unpopularity. The criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio *wholly unavailable* as a medium for the expression of any view which falls within the scope of the constitutional guarantee of freedom of speech. *Robert Harold Scott, supra* at 374, 376 (emphasis supplied).

[62] Two points are worth noting. First, the WHKC policy appears concerned primarily with programming, not advertising time. Second, the Commission was eager to avoid a situation in which the licensee could "impose" his views on the material supplied by outside speakers.

In *Homer P. Rainey,* 11 F.C.C. 898 (1947), the Commission reiterated its nondiscrimination rationale. The broadcasters had limited the time available for sale to political candidates "as a means of maintaining proper program balance." *Id.* at 903. Even though the stations had made *some* time available for sale, the Commission struck down their exclusionary policy as arbitrarily narrow.[63]

In its *United Broadcasting, Scott* and *Rainey* decisions, the Commission was confronted with station policies barring the sale of time for outside presentations on "public" and "controversial" issues. In each case the Commission struck the policy down, rejecting policies of discrimination against editorial speech. Rejecting the idea that First Amendment speech protections were "narrow legalistic concepts," *Scott, supra* at 374, the Commission posited its actions on a need for individual self-expression through the media:

> [F]reedom of speech means freedom to express disbeliefs as well as beliefs. . . . [*F*]*reedom of speech can be as effectively denied by denying access to the public means of making expression effective—whether public streets, parks, meeting halls, or the radio—as by legal restraints or punishment of the speaker. Robert Harold Scott, supra* at 374 (emphasis supplied).

In each decision the Commission "required" licensees to effectuate the basic purpose of what was subsequently called the "fairness doctrine" by allowing *individuals* to acquire broadcast time for controversial speech.

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[63] "Obviously, it would not be in the public interest for the licensee of any radio station . . . to arbitrarily deny or restrict the right of any person to discuss a public controversial issue (*United Broadcasting Co.* (WHKC), Docket No. 6631)." *Homer P. Rainey, supra* at 903.

In 1949 the Commission formalized its earlier decisions into a single document. *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949). Contrary to the Government's contentions, however, the Commission did not repudiate its leading decisions of the previous three years.[64] Quite the opposite, it strongly reaffirmed the need for individualized broadcast speech.

The *Editorializing Report* addressed two narrow issues: could licensees broadcast their own editorials, and if so, what provisions should be made to safeguard "fair and equal presentation of all sides of controversial issues." *Id.* at 1246. It did not address editorial speech by individuals. Nevertheless, the Commission reiterated "the inevitability that there must be some choosing between *various claimants for access to a licensee's microphone,*" *Id.* at 1248 (emphasis supplied), and affirmed the nondiscrimination "duty" announced in *United Broadcasting* and *Scott. Id.* at 1249.

The Commission thus rejected a suggestion that the licensee's public interest obligation could be met

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[64] See U.S. Br. at 47: "But as the Fairness Doctrine developed, the Commission found that it was not necessarily required, as dicta in *United Broadcasting* had indicated, that broadcasters *sell* time to private individuals so long as the broadcaster used his facilities as a forum for discussion of public issues."

In fact, the genesis of the Commission's fairness doctrine has even been attributed to these leading decisions. This Court cited *United Broadcasting Co.* as the Commission precedent requiring broadcasters to "give adequate coverage to public issues." *Red Lion, supra* at 377. The Commission itself cited *United Broadcasting* and *Scott* in its first formal definition of the fairness doctrine. See *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1249-50 (1949).

"*merely* through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time." *Editorializing Report,* at 1251 (emphasis added). The Commission concluded that *more* (not less) was required:

> If . . . the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, *over and beyond their obligation to make available on demand opportunities for the expression of opposing views. Editorializing Report,* at 1251 (emphasis supplied).

The fairness doctrine was thus developed to restrain, not increase, the power of licensees "to exclude the expression of opinions and ideas with which they are in disagreement." *Editorializing Report,* at 1256. Its seminal precedents struck down bans on the purchase of time for "controversial" views. In most cases, editorially controlled speech was apparently sought for programming, and not advertising, time. Advertising was, quite literally, a "free-fire zone, largely ungoverned by regulatory guidelines" (App. 448). It follows *a fortiori,* however, that if editorial access to programming time is required under certain circumstances, then the same would hold true of advertising time.

Nothing in the 1949 Report, the 1959 Amendments to § 315 of the Communications Act, nor *Red Lion* suggests that the fairness doctrine is a substitute for the

direct expression of individual views. Rather, while *Red Lion* did not directly consider the question of editorial speech for outsiders, the Court rejected the licensees' contentions that the First Amendment "protects their desire to use their alloted frequencies . . . to exclude whomever they choose from ever using that frequency," 395 U.S. at 396. The fairness doctrine is therefore neither inconsistent with, nor a blanket substitute for, "the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views." *Red Lion,* 395 U.S. at 400.

III THE FUNCTIONING OF THE REGULATORY SCHEME WILL NOT BE IMPAIRED BY THE NONDISCRIMINATORY SALE OF TIME FOR EDITORIAL ADVERTISEMENTS.

The petitioners advance a number of arguments why discrimination against controversial editorial speech in the sale of advertising time can be tolerated. They strenuously urge that the wealthy and/or proponents of causes able to attract financial support will have an exaggerated influence in setting the agenda of debate on the air. They might buy up all the paid editorial time to promulgate their own views. Then it is argued, the broadcasters' determination of topics to be covered on their own programs can not be made solely on the basis of newsworthiness, journalistic merit and what they regard as most likely to contribute to an informed public. Rather, they will be required to program partially on the basis of the fairness doctrine's requirement that they air viewpoints opposing those presented in paid editorial ads. ABC Br. at 45-48; CBS Br. at 40-43; WTOP Br. at 20-30. "Money alone would determine what issues are to be aired, and in what format" (App. 490) in contravention of this Court's dis-

dain for a system where only the "highest bidder" obtains available time. *Red Lion, supra,* 395 U.S. at 392.

Moreover, under the doctrine of *Cullman Broadcasting Co.,* 40 F.C.C. 576 (1963), if there is no speaker willing to pay to present contrasting viewpoints, licensees may be required to present opposing views at their own expense. And petitioners finally argue that a nondiscrimination requirement will turn licensees into "common carriers," in violation § 3(h) of the Act. Rules to resolve these problems, petitioners argue, cannot be developed. And no matter what rules are developed, they potentially invite Commission and court review, thus injecting the government into every decision to carry or not to carry a particular program.

Each of these arguments is without merit. Individually and collectively they reflect a grossly misleading and warped view of the regulatory scheme.

1. Nondiscrimination in the sale of advertising time will not result in a national agenda determined by the affluent; it will increase the number of voices heard.

While nondiscriminatory treatment of paid editorials might result in some advantages to the affluent, "the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely" (App. 485); i.e., it does not support a flat ban on controversial paid editorials. The "marketplace of ideas" (whether books, movies, pamphlets, newsprint or broadcasting), like any other marketplace, inevitably grants some advantage to those who can pay the price of admission. The wealthy, after all, can purchase a newspaper or broadcast station to

speak; the poor, with scarcely enough money to purchase short spot announcements, cannot. Wealthy business interests can freely purchase spot announcements to purvey their views on many products (automobiles,[65] and until recently, cigarettes [66]) which advocate views on important social issues.[67] Less wealthy groups may not be able to match them dollar for dollar in purchasing time to discuss social issues. This is no justification, however, for excluding the poor altogether. The door of speech should not be slammed in their face when they do raise enough money to pay current rates.

In fact, the availability of paid editorial time on a non-discriminatory basis is likely to produce benefits for the less wealthy. For example, $20.00 will buy one minute of access to about 10,000 listeners of WMOD-FM in Washington, D.C.[68] In Cleveland, Ohio, a metropolitan area of some 3,000,000 people, $50.00 will buy 30 seconds of prime time on one of the city's leading stations, WKYC. In Sandersville, Georgia, a community with only one radio station, the exclusion of Blacks from any access to airwaves was so serious that the Commission ordered a hearing to determine, among other things, if Blacks had been discriminated against in the allocation of free public service announcements. *WSNT, Inc.*, 27 F.C.C. 2d 993

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[65] *Friends of the Earth* v. *F.C.C.*, 449 F.2d 1164 (D.C. Cir. 1971).

[66] *Banzhaf* v. *F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. den. sub nom. Tobacco Institute* v. *F.C.C.*, 396 U.S. 842 (1969).

[67] *Cf. Wilderness Society*, 30 F.C.C.2d 643, *aff'd on rec'n*, 31 F.C.C.2d 729 (1971), (environmental impact of the trans-Alaska pipeline).

[68] *American Research Bureau Radio Estimates*, January 13-February 9, 1972. Respondent was able to obtain listernship data only for Washington, D.C. stations.

(1971). The nondiscrimination rule adopted by the court below and $3.75 (the cost of a one minute spot) would possibly have avoided the lengthy, cumbersome, and expensive challenge to the station's license renewal. Only ten cents more ($3.85) would allow a speaker to present his views for one minute over KBVB, a Reno, Nevada station.[69]

Moreover, one need not be wealthy to purchase one spot announcement and in it request funds to finance the purchase of additional time. The Commission has ruled that it would be arbitrary to bar significant polical parties from soliciting funds (App. 269-70).[70] Nondiscriminatory treatment requires that other groups be afforded a comparable opportunity.

A more substantial problem, as the court below observed, "is not that editorial advertising will cost money, but that it may be dominated by one group from one part of the political spectrum" (App. 485). If a serious danger develops of the public being overwhelmed by a particular viewpoint via paid editorials,[71]

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[69] All information reflects rate card data quoted in *Standard Rate & Data Service, Inc.*, Volume 54, Number 6 (June 1, 1972). Actual rates are often lower.

[70] See discussion at p. 15, *supra*.

[71] It is highly likely that an attempt to saturate the airwaves with one set of views would lead to "counter-campaigns." The petitioners' briefs refer to the "wealthy" as though they were an organized, monolithic lobby determined to impose a particular set of values upon society. But views on national priorities and on the many sides of any issue are not uniform among wealthy interests. A campaign by electric companies, for example, in favor of increasing nuclear generating stations might be opposed by the local natural gas distributor. Similarly, if BEM launched a massive anti-war campaign it is likely that those businessmen and others who support current policies would respond.

These counter-campaigns are not without significance for the

the licensee has a variety of ways to assure balanced coverage of contrasting viewpoints.

The court below explicitly recognized that it might be necessary to limit the amount of time devoted to a particular group or exposition of a "narrow viewpoint" (App. 485). Such limitations can be based on the same reasonable, good faith judgments a licensee must make under the fairness doctrine; the licensee can retain the same broad discretion accorded him by the Commission[72] and the courts[73] in defining the issues raised.[74] It is pure sophistry to argue that licensees are incapable of judging whether a "narrow view-

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Cullman problem discussed below. Much of the balance required to offset paid editorials can be achieved without any need for the licensee to sacrifice either a cent in revenue or a single moment of programming time.

[72] *E.g., National Broadcasting Co.*, 25 F.C.C. 2d 735 (1970) (opposing viewpoint on "issue or relative safety of private versus commercial pilots (and therefore the relative hazards created by planes so flown)" is subsumed within contrasting views presented on the problem of "air congestion near major airports").

[73] *E.g., Green* v. *F.C.C.*, 447 F.2d 323 (D.C. Cir. 1971) (contrasting views on issue of whether it is ever desirable, rewarding or the best way to serve one country by bearing arms is balanced by views opposing the draft and the Vietnam war).

[74] There is a direct, costless remedy to licensees if they are genuinely concerned that only the wealthy are gaining access to discuss issues of concern to them. Licenses can take time already devoted and allocated to presenting *free* public service announcements and allow them to be used by community groups to present their editorial messages. (This process is costless, since the time is already allocated to presenting public service announcements of a more traditional nature, such as military recruitment ads, ads promoting Boy Scouts, charitable organizations, etc.) Indeed, a number of licensees have already successfully experimented with such a system. Several others are about to adopt similar schemes. And even major group owners, such as Westinghouse Broadcasting, are beginning to use the system. "1972's 'Vox Pop' is Access Through

point" is unduly duplicative of an issue already aired; they make these judgments daily in administering the fairness doctrine.

2. Nondiscriminatory sale of advertising time need not result in excessive financial burdens or unwarranted incursion on a licensee's journalistic discretion.

A licensee's sole legitimate interest in refusing to run a paid editorial stems from obligations that might be incurred under the fairness doctine.[75] Under the fairness doctrine paid editorials might create an obligation to present opposing points of view free of charge, *Cullman supra,* or otherwise impinge on a licensee's total control over the content of its programming.

As the discussion *supra* (p. 53) makes clear, the fairness doctrine vests broad discretion in the licensee.

Spots," *Broadcasting Magazine,* July 10, 1972, p. 29. These "free speech messages" could be used to allow contrasting viewpoints to the paid editorials of the wealthy. This would not only prevent the domination of the air by vested, moneyed interests. It would go far to alleviate the concern that imbalances created by paid editorials would have to be offset by intrduing on the licensee's journalistic discretion or by presenting contrasting views on time otherwise required for sale to advertisers.

[75] The broadcaster petitioners assert an interest in keeping frivolous, unimportant, or crackpot speeches off the air. (See pp. 23-24, *supra.*) These assertions are anathema to First Amendment interests and have been discussed above. (See pp. 15-23.) They warrant no further attention here.

It should, however, be noted that the broadcasters' instinct to censor is present even when the issue is of clear public significance and there are no possible *Cullman* problems or infringements on a licensee's journalistic discretion. In testimony before Congress, an executive of Allstate Insurance Company stated that the networks had refused to run ads praising airbags even after the company had offered to pay for the time used in broadcasting replies to the ads. See footnote 54, *supra.*

E.g., Editorializing Report, supra, 13 F.C.C. at 1251. *See Honorable Oren Harris,* 40 F.C.C. 582, 585-86 (1963). The licensee's discretion extends to determining which issues will initially be covered; which issue(s) is (are) raised by the program in question; whether the matter is controversial; the amount of time to be devoted to opposing views; the scheduling of the opposing views; the frequency with which such views are presented; the format with which contrasting views are presented; and the spokesman who will present the views. *Applicability of the Fairness Doctrine to the Handling of Public Issues,* 29 Fed. Reg. 10415, 10416 (1964) (hereinafter "Fairness Primer"). *See Committee for Fair Broadcasting,* 25 F.C.C. 2d 283, 291-94 (1970). *See* generally *Fairness Primer, supra.* The fairness doctrine "does not apply with the precision of 'equal opportunities' "; rather the requirement is one of overall balance in programming and reasonable opportunities to present contrasting views. *Ibid.*

Applying these standards to the potental impact of paid editorials on a licensee's financial position under *Cullman* and on a licensee's journalistic discretion, it is plain that there is ample latitude for resolving the problems raised by nondiscrimination against paid editorials. Obviously if a proffered editorial deals with an issue that is not controversial the fairness doctrine does not apply.[76]

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[76] As in the fairness doctrine cases, the licensee would make the determination as to the issue raised, its controversiality, etc., subject to review for reasonableness by the Commission. Contrary to the strident tone of petitioners' briefs, this would not result in "a constitutional litigation." It would be a garden variety review of administrative action to assure that it was reasonable.

Editorials dealing with controversial issues already covered by the licensee might inject a new slant or a new voice.[77] However, this is unlikely to give rise to any new fairness obligations, given the latitude afforded a licensee in defining the issue raised, p. 53, *supra,* and in determining whether coverage is balanced.[78] In the highly improbable event that such an editorial advertisement did trigger fairness obligations, a licensee *might* be justified in refusing to air it, but this cannot justify the flat ban at issue in the instant case.

Moreover, although an editorial advertisement might give rise to a fairness obligation, the *Cullman* doctrine need not impose undue financial hardships; nor need a licensee's journalistic integrity be seriously compromised. If the volume of paid editorial ads is such that there is a serious threat to a licensee's revenue if he provides opposing viewpoints in spot advertising time,[79] he can meet his obligations via other programming. While that might impinge on the licensee's "journalis-

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[77] BEM's anti-war editorials probably fall within this category. WTOP has not stated that BEM's editorials would raise the ratio of anti-war to pro-war views to an impermissible proportion. Indeed the F.C.C. has accepted WTOP's affidavit that "each of the viewpoints embodied in the BEM announcements has been expressed on a number of occasions in various types of broadcasts over WTOP." (App. at 352).

[78] In *National Broadcasting Co. (WNBC)*, 16 F.C.C. 2d 947 (1969), the Commission held that a licensee who presented cigarette commercials advocating the use of cigarettes eight (8) times as often as it presented anti-smoking announcements was in compliance with the fairness doctrine.

[79] As discussed above, there is nothing to indicate that this volume of paid editorial ads will be realized.

tic discretion", the encroachment need not be great. Given his wide ranging discretion in presenting an over all balance in programming, a licensee may balance and trade off between declines in revenue and interference with "journalistic integrity." He need not sacrifice all, or even any of either, to administer a nondiscriminatory regime of accepting paid editorials.

Lastly, editorial advertisements may deal with controversial issues receiving inadequate or no attention from a licensee. If so, then basic First Amendment objectives have been served. Moreover, as the discussion in the previous paragraph makes clear, such a situation need not mean excessive financial burden or undue infringement on journalistic discretion. And again, the fact that *some* editorial advertisements may create these problems can hardly be said to support a flat ban on *all* such editorials.

In any event, absent a showing of overwhelming hardship,[80] licensees should not be permitted to flatly refuse to air issues of controversy and importance in their communities. It is desirable for paid editorial announcements to trigger a licensee's obligation to inform its audience of significant views on controversial issues and to cover fairly all representative viewpoints. Indeed, licensees already have this obligation.[81] It is not

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[80] Again, the showing required and whether it had been met would essentially be matters for the agency to determine. Each case would not involve major constitutional litigation. See pp. 60-61, *infra*.

[81] *E.g, Gary Soucie,* 24 F.C.C. 2d 743, 750-51 (1971), *rev.'d on other grounds sub nom. Friends of the Earth* v. *F.C.C.,* 449 F.2d 1164 (D.C. Cir. 1971).

unreasonable to expect licensees to bear this "burden" as a part of the privilege of holding a broadcast license.

It has also been suggested that the fairness doctrine, or at least the *Cullman* aspect of it, i.e., the obligation to present opposing points of view free of charge, be suspended as to paid editorial advertisements (App. 281, 486). There is objection to this on the ground that only those rich enough to buy time would be heard.[82] This is not necessarily so. We have already noted that a licensee who carries these editorials could limit the number of such announcements or provide responses in time normally allocated to public service announcements. Moreover, if *Cullman* were suspended, the tendency of groups with opposing views to raise and expend funds to present their views would be heightened. And a *Cullman* exemption need not be a blanket exemption. The applicability of *Cullman* might be suspended upon a showing of threatened financial harm in particular cases.

In fact, the Commission has recognized the wisdom of a suspension of the *Cullman* aspect of the fairness doctrine in other situations. In *Nicholas Zapple,* 23

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[82] The Government concludes that suspending or adjusting *Cullman* is hardly likely to result in a " 'better' regulatory scheme than, or a significant improvement in, the present system which requires licensees to cover public issues and present contrasting views." U.S. Br. at 57-58. This of course is not the issue. The court below mandated no scheme that necessarily is or will be "better" or worse than the present one. The court merely struck down an unconstitutional discrimination within an otherwise permissible scheme and directed that the future administration of the regulatory scheme reflect nondiscriminatory treatment for editorial advertisements.

F.C.C. 2d 707 (1970), it ruled that the fairness doctrine, rather than the "equal opportunities" provision of Section 315 of the Communications Act, applies where a spokesman for, or organization backing, a candidate buys time to endorse his candidacy but the candidate himself does not appear. The Commission ruled that the licensee would be required to sell time to a spokesman for the opposing candidate but not to make time available free, even though *Cullman* would ordinarily apply. The Commission justified this exception from *Cullman* and creation of a "quasi-equal opportunities" rule on the ground that to rule otherwise would allow the second candidate to have his candidacy subsidized by receiving free time after the first candidate had purchased time.

Zapple's reasoning is directly in point here. If paid editorials are not allowed because of *Cullman,* speech is silenced. If *Cullman* is applied, then the first spokesman purchasing time might be subsidizing his adversary. *Zapple* indicates that the Commission has both been willing and able to respond imaginatively to such specialized regulatory problems. It can do so here, too.

3. Nondiscrimination in the sale of time will not result in excessive govenmental incursion into broadcaster journalistic discretion.

The broadcaster petitioners raise the related spectres of "administrative apocalypse" (App. 484) in implementing guidelines and omnipresent governmental censorship through agency and court review of licensee decisions in developing and administering guidelines governing non-discrimination against paid editorials. (ABC Br. at 44-56; CBS Br. at 39-46; WTOP Br. at 29-34, 40-44, 45-52). The Government, while recogniz-

ing that there may be difficulty in developing a reasonable system of allocation (U.S. Br. at 56), is less concerned about censorship through Commission and court review. Rather its concern is that the Commission might be inundated with disputes over discrimination in the sale of time for editorials. The Government itself cites an eruption of litigation in the fairness area (U.S. Br. at 60-61, n. 60). Such a development is to be anticipated and welcomed in the evolution of a body of law dealing with precious First Amendment rights. There may well be litigation testing whether particular guidelines are discriminatory. But the fact that a judicial decision concerning First Amendment rights *may* create future administrative problems is no reason for the Court to avoid resolving important constitutional issues; this is particularly true here since the Commission has broad discretion to formulate and adopt guidelines designed to minimize such problems. See *Red Lion, supra,* 395 U.S. at 393.[83]

Moreover, as the standards for nondiscriminatory treatment of editorial advertisements emerge and are strengthened, there is no reason to believe that every refusal to broadcast a program will be carried to the courts or occasion a constitutional litigation. The more likely result is that if they are brought at all, more cases will be resolved at the administrative level on the basis of established case law and definitive regulations.

Indeed, developing and implementing guidelines concerning paid editorials on controversial issues should alleviate the Government's concerns. In implementing these guidelines, the same fairness doctrine

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[83] *Cf. Freedman* v. *Maryland,* 380 U.S. 51 (1965).

standards of deference to the reasonableness and good faith of the license could be operative.[84] Other reasonable rgeulations, not necessarily limited to time, place and manner,[85] governing the acceptance of editorials could be adopted.[86] And of course should demand for editorial time exceed supply, the courts have recognized both the feasibility and necessity of allocating a forum between competing claimants.[87]

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[84] However desirable this deference to licensee discretion, it serves to highlight the need for non-discrimination in the sale of time.

[85] "*At the least*, there may be regulations determining the time, place, and manner of speech" (App. 483 (emphasis supplied)).

[86] As discussed above, the Court, for examle, left open the possibility that it might be necessary to limit the amount of time sold for presentation of a particular viewpoint (App. 485).

[87] *E.g., Kissinger* v. *New York City Transit Authority*, 274 F.Supp. 438, 443, n. 6 (S.D.N.Y. 1967):

> Defendants also argue that if they accept the posters for display, they will have to accept other posters relating to United States' participation in the war in Vietnam with the result that commercial advertising will be curtailed and the subways will become a political and ideological battlefield. Even if the Authority and the Advertising Company are required to accept the posters for display, however, it does not follow that others must be accepted, and, in addition, the Authority and the Advertising Company could impose reasonable regulations on the display of plaintiff's posters and other of a similar nature as to the number to be displayed and the time and place for their display.

See also *Farmer* v. *Moses, supra; Wirta* v. *Alameda-Contra Costa Transit District, supra; Robert Harold Scott, supra; United Broadcasting Co. (WHKC), supra.* Licensees should be more adept at adopting reasonable regulations than are bus companies. Guidelines might include a preference for new viewpoints and/or new speakers over viewpoints and/or speakers adequately presented, a preference for representatives of groups that have historically been excluded from the mass media, etc.

4. The licensee's interests and the Commission's authority.

We have demonstrated that there are no sound reasons which justify discriminatory access for paid editorials. Such access will not destroy the fairness doctrine; indeed, in almost all cases it will further the objectives of fairness and presents problems no different than those already encountered in administering the fairness doctrine. In those unlikely cases where a licensee's financial position is seriously debilitated, the standards and experience gained under that very same fairness doctrine can be the safeguards for assuring its continued vitality.[88]

In *United Broadcasting Co.* (*WHKC*), 10 F.C.C. 515 (1945), the Commission stated that a station that followed the discriminatory policy at issue here contravened the public interest.[89] The petitioners have advanced no reasons why that policy is no longer viable.[90] They have not shown that their primary interest, i.e., protecting their own speech and the right

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[88] BEM does not by any means suggest that only in the guidelines or principles here advanced can appropriate guidelines be found for administering nondiscriminatory treatment for paid editorials. We suggest these guidelines only as a starting point for analysis and to show that workable guidelines can be developed.

[89] See App. 487.

[90] The Government attempts to distinguish *United* by noting that it predated the *Editorializing Report* (U.S. Br. at 46). The error of this attempt has been discussed above, pp. 47-48, *supra*. But it should also be noted that the proposed station operation adopted by the Commission in *United* included *both* a provision for nondiscriminatory treatment of paid editorials and a provision which parallels the modern statement of the fairness doctrine.

> The station will see that its broadcasts on controversial issues, considered on an overall basis, maintain a fair balance among the various points of view, i.e., over the weeks and months it will maintain such a balance with respect to local and network programs, both sustaining and commercial alike. 10 F.C.C. at 517.

of the public to hear, can not be accommodated under such a system. They have no interest in keeping paid editorials off the air except as their own speech is affected via the fairness doctrine.[91] Their speech is and can be further insulated from unreasonable incursions if reasonable guidelines are developed.

Recently the Commission acknowledged that a licensee's interest in keeping even highly controversial speech off the air is minimal. A white segregationist candidate for U.S. Senator purchased blocs of time to run an ad claiming that the incumbent's policy "takes jobs from us whites and gives those jobs to the niggers . . . niggers want integration . . . because the niggers want our white women . . . you cannot have law and order and niggers too." The Commission refused to prevent stations from running the ad. Although the case arose under the "no censorship" clause of Section 315, the Commission went beyond that provision in stating:

> It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminello* v. *Chicago,* 337 U.S. 1, 4 (1949); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568; *Ashton* v. *Kentucky* [384 U.S. 195], 34 LW 4398 (1966). This most assuredly does not mean that those who uphold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even high-

[91] Obviously licensees could prevent illegal materials such as obscene or defamatory editorials from being broadcast.

> ly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial.
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> *Letter to Lonnie King,* F.C.C. 72-711, mimeo. no. 80175 (August 3, 1972), quoting *Anti-Defamation League of B'nai B'rith,* 4 F.C.C.2d 190, 191 (1966), *aff'd Anti-Defamation League B'nai B'rith* v. *F.C.C.*, 131 U.S. App. D.C. 146, 403 F.2d 169 (1968) *cert. denied,* 394 U.S. 930 (1969).

There is a public interest and a constitutional right in hearing even this speech, if for no other reason than to demonstrate its error. Moreover, speech that is "frivolous" or "abhorrent" today may deal with the significant issues of tomorrow. The listening public, not licensees, must determine which speech is worthy of consideration and which is not.

5. Section 3(h) and the "common carrier" doctrine.

The petitioners, citing Section 3(h) of the 1934 Communications Act, 47 U.S.C. § 153(h) as amended (1964), which prevents licensees from treatment as "common carriers," argue that the ruling below would drag licensees into "common carrier" status, unable to resist a deluge of requests for airtime (ABC Br. at 36-38; CBS Br. at 28-33; WTOP Br. at 34-40; U.S. Br. at 40-45).

This argument is faulty on several grounds. Primarily, it misconstrues the decision below. The court of appeals carefully limited itself to prohibiting licensees which *elect* to sell some of their airtime to advertisers from flatly refusing to sell any of that time to editorial spokesmen. The basic control over whether to sell advertising time and, if so, how much, rests with the licensee. This is the opposite of a common carrier, which

must sell to all who seek its service. The history and purpose of Section 3(h) confirm this basic proposition.

Section 3(h) provides only that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier." Although Congress did not define "common carrier" the term normally describes a public utility must accept *all* requests for service and at rates fixed or approved by regulatory agencies.[92] In Section 3(h), Congress thus relieved broadcast licensees of rate regulation and the obligation to accept *all* requests for airtime, whether commercial or editorial.

Petitioners cite a fragment of legislative history of the 1927 Radio Act to support their contention that § 3(h) prohibits any requirement that they not discriminate against editorial advertisers (*eg.* U.S. Br. at 41). The cited language, which Congress ultimately rejected,[93] provided that once a licensee permitted its

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[92] In 1925, a Committee on Legislation of the Fourth National Radio Conference urged that the Radio Act "not bring the broadcasting stations into the category of recognized public utilities." The Committee viewed this category as including "such matters as *regulation of rates* and other similar features of supervision exercised by governmental bodies over public utilities. . . ." *Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio*, p. 34 (Nov. 9-11, 1925) (Wash. Gov't. Printing Office, 1926). In *Great Lakes Broadcasting Co., supra*, at 32, the Commission also refused to treat broadcast licensees as common carriers, stating that such a station would then "have to accept and transmit [programming] for *all* persons on an equal basis without discrimination in charge, and according to rates fixed by a governmental body". BEM, in contrast, does not argue that stations must accept *all* requests for airtime, nor does it contend that the Commission must regulate advertising rates.

[93] "In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty* v. *United States*, 340 U.S. 8, 13-14 (1950); *United States* v. *United Mine Workers*, 330 U.S. 258, 281-282 (1947)." *Red Lion, supra*, at 382 n. 12.

facility to be used "for the discussion of any question affecting the public," it should be deemed a "common carrier" with respect to such questions. In rejecting the proposed language, Congress sought to ensure that licensees would not have to accept *all* requests for airtime on public issues they covered.[94] Moreover, the rejected language only embodied the "door opener" concept—namely, that any station broadcasting one side of a controversial issue would be required to present opposing viewpoints—which has become the basic part of the fairness doctrine.

The Commission itself has accepted this analysis. *United Broadcasting Co. (WHKC), supra,* at 517-18, prohibited licensee refusal to sell time to controversial speakers and handily disposed of Section 3(h) objections:

> It is recognized, of course, that the physical limitations on the amount of spectrum space available for radio broadcasting and the large demands upon radio stations for use of time make it impossible for every person desiring to use the facilities of a station to be granted this privilege. Under section 3(h) of the act, broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee . . . to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship . . .
>
> [T]he operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . .

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[94] The statements cited by petitioners support this interpretation. Thus Senator Dill was afraid the proposed language would force the broadcaster to "accept *anything and everything* that was offered him so long as the price was paid" (67 Cong. Rec. 12504). See U.S. Br. at 41. Neither BEM nor the court of appeals have ever suggested that licensees must sell *all* their programming, nor even *all* their advertising time.

is inconsistent with the concept of public interest. . . .[95]

The Commission cannot at this late date repudiate the reasoning of its earlier opinion without some reasoned and compelling justifications. Yet none have been advanced.

Rather than to permit discriminatory policies regarding the sale of advertising time, Section 3(h) was designed to prevent the Commission from regulating broadcast licensees under the detailed "common carrier" provisions of Title II of the Communications Act of 1934, 47 U.S.C. et seq. (1964).[96] In *United States* v. *RCA*, 358 U.S. 334 (1959), this Court defined "common carriers" as able to charge "only the published tariff." "Free rate competition" for such carriers is "modified by federal controls." Tariffs established by regulatory agencies must be "reasonable." *Id.* at 348. By contrast, the Court concluded that radio broadcasters were not "common carriers," and therefore not subject to Title II of the Act:

> While the television industry is also a regulated industry, it is regulated in a very different way. That difference is controlling. Radio broadcasters, including television broadcasters, . . . are not in-

[95] *Accord, Robert Harold Scott*, 11 F.C.C. 372, 376 (1946). See also *Office of Communications of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966): "The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency." *Id.* at 1003. This in-between status at the least requires licensees which sell advertising time to accept some, but not all, requests to speak on controversial issues as ruled below.

[96] Commissioner Johnson also accepts this view (App. 415).

> cluded in § 3(h) of the Communications Act . . . , as are telephone and telegraph companies. Thus the extensive controls, including rate regulation of Title II . . . , do not apply. Television broadcasters remain free to set their own advertising rates. . . . *United States* v. *RCA, supra* 358 U.S. at 348-49.

Nothing in the ruling below prevents broadcasters from setting their own rates, nor, indeed from selling no time to the public at all. It merely holds that when a licensee does sell advertising time and rates he has determined, he cannot flatly refuse to sell any of that time to an editorial spokesman willing to pay his rate.

Finally, whatever the application of Section 3(h), it seems apparent that Congress was only concerned that advertiser demands might invade programming time. Common carrier status for broadcasters might "crowd most or all of the better *programs* off the air." *Great Lakes, supra,* at 33. Broadcasters might be forced to "give all their time" to public discussion (67 Cong. Rec. 12504). Absence of Section 3(h) might disrupt the "percentage" of the broadcast day "devoted to news and discussion or consideration of public issues." *Editorializing Report, supra,* at 1249. The lower court's ruling, however, would not affect programming time: it only bars discrimination in advertising time "relinquished by broadcasters to others" (App. 464). And the broadcaster has complete control over how much, if any, time he relinquishes.

Thus, the "common carrier" arguments have little to do with the facts of this case; petitioners have succeeded only in knocking down a straw man.

IV. FLAT BANS ON THE SALE OF EDITORIAL ADVERTISING, AS APPROVED BY THE F.C.C. IN THIS CASE, CONSTITUTE SUFFICIENT "STATE ACTION" TO BE SUBJECTED TO FIRST AMENDMENT CONSTRAINTS.

The court below thoroughly analyzed the relationship between broadcast licensees and the Federal Government and held that, although they may be "private entities" for some purposes, broadcasters are subject to First Amendment constraints when they discriminatorily allocate their air time among editorial speakers (App. 455-464).[97] The "state action" finding was grounded in the substantial "governmental involvement in" and "public character of" the broadcast media (App. 456). The Commission's explicit approval of flat bans in *DNC* and *BEM* (App. 461), and the "importance and suitability of" the broadcast media as a forum "for the communication of ideas" (App. 459).[98]

The three broadcaster petitioners and *amicus* NBC argue that the court below erred in finding "state action," that broadcasters are private businesses not subject to the First Amendment, and that they may therefore accept or reject editorial advertisements on any basis, discriminatory or non-discriminatory.[99] On the other hand, the Government apparently concedes the "state action" finding:

> The Commission and the court below are agreed that broadcast regulation must be guided by the

[97] The Commission apparently concurs. See *DNC* (App. 266).

[98] Commissioner Johnson, in an exhaustive analysis of state action principles (App. 378-99), also concluded that the actions of licensees and the Commission in rejecting editorial announcements were "sufficiently involved with the state to invoke the restraints of the Constitution" (App. 398).

[99] See CBS Br. 47-55; ABC Br. 25-30; NBC Br. 15-17; WTOP Br. 52-62.

public's First Amendment interests in the communications media; indeed Congress and the Commission have recognized this from the outset. And it is common ground that the public has an interest not only in the content of the discussion of controversial public issues, but also, as the Court of Appeals put it, "in the mode or manner" of the presentation (App. 466). U.S. Br. at 32-33.[100]

We submit that the pervasive regulatory scheme and the unique importance of the broadcast media to mass communications fully supports the finding of state action by the court below.

1. State action derives from the license or "lease" of control over public property from the Government to individual licensees and the Government's close supervision and control of licensees' broadcasting policies.

There is no magic formula for determining when the actions of an allegedly "private" entity like a broadcast licensee bring it within the orbit of constitutional imperatives. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Under all of the leading tests for determining state action, however, including those set forth in *Burton*, and last term in *Moose Lodge No. 107* v. *Irvis*, —— U.S. ——, 92 S.Ct. 1965 (1972) and

[100] Application of the First Amendment to broadcasters' advertising policies need not be based on a finding of "state action." It can be grounded in the "public interest" imperatives of the Communications Act (e.g. 47 U.S.C. § 307(a)), the fairness doctrine (47 U.S.C. § 315), and the overall puposes of the regulatory scheme. Thus, this Court's finding that "broadcasting is clearly a medium affected by a First Amendment interest" (*Red Lion*, *supra*, 395 U.S. at 386), is not bedded on an *explicit* finding of state action.

Lloyd Corp., Ltd. v. *Tanner,* —— U.S. ——, 92 S.Ct. 2219 (1972), broadcast licensees are unquestionably subject to First Amendment restraints in the allocation of their advertising time.

In *Burton,* a state agency leased space in its large municipal parking garage to a privately owned restaurant. The restaurant's refusal to serve Negroes was held to constitute state action violative of the Fourteenth Amendment. Although the Court enumerated a number of decisional factors, they all derived their force from the underlying lease relationship.

Thus, "[t]he land and building were publicly owned" and "dedicated to 'public use' in performance of 'essentially governmental functions' " (365 U.S. at 723). The restaurant area was not "surplus" state property, but an "integral and, indeed, indispensible part o fthe State's plan to operate its" parking lot (*Id.* at 723-24). The lease arrangement conferred on both lessor and lessee a "variety of mutual benefits." (*Id.* at 724). The restaurant was not a "private club" operating on private property as in *Moose Lodge, supra,* but held itself open for business to the general public. The Negro complainant went to the restaurant for service, not for some non-restaurant related activity. Compare *Lloyd Corp., supra,* discussed, *infra,* at pp. 78-79.

Given these factors, the Court concluded that "when a State leases public property in the manner and for the purpose shown to have been the case here," it "has elected to place its power, property and prestige behind the admitted discrimination." (*Id.* at 726.) Under such circumstances, the lessee is bound by constitutional proscriptions "as certainly as though they

were binding convenants written into the agreement itself." (*Ibid.*)[101]

Each of these factors applies to the present case. The channels of broadcast transmission, which WTOP and other stations are exclusively licensed to operate, are publicly owned. Section 301 of the Communications Act of 1934 makes this explicit:

> It is the purpose of this Act . . . to *maintain the control* of the United States over all the channels of interstate and foreign radio transmission; and to provide for the *use* of such channels, but *not the ownership* thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, *beyond the terms, conditions, and periods of the license.* 47 U.S.C. § 301 (1964) emphasis supplied).

The broadcast frequencies are also dedicated to "public uses," the licensee being required to operate "in the public interest, convenience, and necessity." 47 U.S.C. §§ 307(a), 309(a) (1964).

Broadcast frequencies are also not "surplus" government property, but an "integral" part of its scheme to "generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g)

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[101] The F.C.C., in prohibiting broadcasters from engaging in discriminatory employment practices, acknowledged the relevance of *Burton*:

> [A] substantial case has been made that because of the relationship of the government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity. . . . The contention is rested upon such decisions as *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C. 2d 240, 241 & n.2 (1969).

(1964). Indeed, government regulation alone makes "radio communication *possible* by requiring licensees to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion, supra,* 395 U.S. at 389 (emphasis supplied).[102] Because of these factors, and because as monopoly holders of scarce public resources they must act "as proxies for the entire community," *Red Lion,* 395 U.S. at 394, licensees also perform a "governmental function."

Although broadcast stations are not constructed with public funds, the government subsidizes and protects their operations against economic competition. See *F.C.C.* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 476 (1940); *Carroll Broadcasting Co.* v. *F.C.C.* 258 F.2d 440 (D.C. Cir. 1958). Their frequencies are a "valuable part of the public domain."[103] and are licensed to them for only a nominal fee. Licensees "have often attained their present position because of their initial government selection in competition with others." [T]hese advantages are the fruit of a *preferred position conferred by the Government." Red Lion,* 395 U.S. at 400 (emphasis supplied).

Finally, the broadcast license confers on both parties a "variety of mutual benefits." The licensee receives a limited monopoly, protected from unlimited competition. The government provides broadcast service for the nation without constructing and operating its own stations.

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[102] Compare *Moose Lodge, supra,* discussed, *infra,* 77-78. Were the private club's license revoked, it could still continue—without serving alcohol. Broadcast licensees, on the other hand, cannot operate at all if their licenses are revoked. Indeed, the Government imposes criminal sanctions on those who broadcast without a license. 47 U.S.C. § 501 (1964) ($10,000 fine, one year's imprisonment).

[103] *Office of Communication of the United Church of Christ* v. *F.C.C.,* 359 F.2d 994, 1003 (D.C. Cir. 1966).

These factors, coupled with the elaborate governmental control over broadcasting,[104] make it impossible

[104] There are many legislative and administrative regulations which demonstrate the soundness of the finding by the court below that "the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the Federal Government—a relationship which puts that industry in a class with few others. It is one of 'inter-dependence' and 'participa[tion].' See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (App. 459-460).

These aspects of regulation of broadcast licensees include F.C.C. authority to: assign frequency bands (47 USC Section 303(c)); allocate licenses by location (Section 303(d)); regulate apparatus (Section 303(e)); establish service areas (Section 303(a)); regulate chain ownership (Section 303(k)); require the keeping of detailed records (Section 303(j)); establish qualifications of licensees (Section 303(l) (one)); suspend licenses (Section 303(m) (one)); inspect station facilities (Section 303(n)); require publication of call letters and other information (Section 303(p)); make rules to effect regulation of radio and television (Section 303(r)); require that television sets can receive all signals (Section 303(s)); regulate the granting of licenses and terms thereof (Sections 307 and 309); prescribe information to be supplied by applicants for license (Section 308(b)); regulate the transfer of licenses (Section 310); impose sanctions on licensees, including revocation of license (Section 312); require fair coverage of controversial issues (Section 315); control the operation of transmitting apparatus (Section 318); prohibit the use of offensive language (Section 326).

Pursuant to statutory authority, the FCC by regulation (47 CFR Section 73.17 *et seq.*) has promulgated myriad regulations governing all aspects of licensee conduct, from hours of operation (Section 73.23) to multiple ownership of licenses by a single person (Section 73.35); from station location and program origination (Section 73.30) to maintenance of detailed logs of programming, operation and maintenance (Sections 73.111-116); from billing practices (Section 73.124) to the personal attack and political editorial fairness requirements upheld in *Red Lion* (Section 73.123); from the relationship a licensee may have with a network (Section 73.131-139) to permissible equipment (Sections 73.39-50). The above regulations relate only to AM-radio. Similar regulations exist for FM-radio, (Section 73.201 *et seq.*) and television (Section 73.601 *et seq.*).

to find that the Government is not a "partner" or "joint venturer" in the licensees' operations, at least insofar as they relate to coverage of controversial *public* issues. *Burton, supra,* 365 U.S. at 725; *Moose Lodge, supra,* 92 S.Ct. at 1973.

If anything, the case for "state action" herein is much stronger than *Burton.* Unlike the restaurant in *Burton* which had a twenty-year lease and was not statutorily required to serve the "public interest," broadcast licensees are given three-year licenses which are renewable only if the Government determines that their past programming *performance* has served the "public interest, convenience and necessity." 47 U.S.C. §§ 307(a), 309(a) (1964). Unlike the restaurant lessee, broadcasters are subject to continuing governmental rgeulation of their operations.[105] The Communications Act was specifically designed "to effect Congressional desires 'to maintain . . . *a grip* on the dynamic aspects of radio transmission' and to allay fears that 'in the absence of *governmental control* the public interest might be subordinated to monopolistic domination in the broadcasting field.'" *Red Lion, supra,* at 395, quoting *F.C.C.* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 137-38 (1940) (emphasis supplied). The finding of "state action" here follows *a fortiori* from *Burton.*[106]

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[105] The fairness doctrine, rather than immunizing licensees from the need to broadcast individual speech, see U.S. Br. at 33-34, comprises an important part of continuing government supervision.

[106] The *Burton* rationale is supported by a long line of federal and state cases holding that where the government itself could not discriminate in operating its property, then it cannot avoid the constraints of the Constitution by "leasing" that property to a private individual or corporation. *Turner* v. *City of Memphis,* 369 U.S. 350 (1962) (private restaurant leased from government). For similar cases involving restaurants on public property, see

This Court's recent decisions in *Moose Lodge, supra,* and *Lloyd, supra,* also support the finding of state action by the court. In *Moose Lodge,* a "private" club, using privately owned facilities, refused to serve a Negro guest. The Court concluded that the mere issuance of a state liquor license to the club did not render its discriminatory policy "state action."

Unlike broadcasters, the private club did not acquire its basic right to operate by "lease" from the state; it performed no "public function," was not fi-

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Derrington v. *Plummer,* 240 F.2d 922 (5th Cir. 1956), *cert. denied,* 353 U.S. 924 (1957); *Adams* v. *City of New Orleans,* 208 F.Supp. 427 (E.D. La. 1962); *Anderson* v. *Moses,* 185 F.Supp. 727, 733 (D.C.N.Y. 1960) ("private . . . concessionaire [operated] on public . . . property for the convenience and comfort of the public"); *Coke* v. *City of Atlanta,* 184 F.Supp. 579 (N.D. Ga. 1960); *Nash* v. *Air Terminal Services,* 85 F.Supp. 545 (E.D. Va. 1949). For analogous cases, see *Muir* v. *Louisville Park Theatrical Ass'n,* 347 U.S. 971 (1954) (public amphitheatre leased to private party); *City of Greensboro* v. *Simkins,* 246 F.2d 425 (4th Cir. 1957) (golf course on public land leased to private lessee); *Farmer* v. *Moses,* 232 F.Supp. 154, 159 (S.D.N.Y. 1964) ("when a city or state leases public property [such that] . . . services . . . are actually performed by a 'private' lessee, the latter stands in the shoes of the government"); *Jones* v. *Marva Theatres, Inc.,* 180 F.Supp. 49 (D. Md. 1960) (theatre in city hall); *Tate* v. *Dept. of Conservation & Development,* 133 F.Supp. 53 (E.D. Va. 1955), *cert. denied,* 352 U.S. 838 (1956). See also *Tucker* v. *Texas,* 326 U.S. 517 (1946) (village wholly owned by United States Government).

The courts have specifically applied this doctrine to advertising space leased by the Government to "private" advertising firms. *Kissinger* v. *New York City Transit Authority,* 274 F.Supp. 438 (S.D.N.Y. 1967) (city "leased" public advertising space on city buses to "private" advertising agency); *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P.2d 350 (Wash. 1969) (private advertising agency operating pursuant to "contract" with city); *Wirta* v. *Alameda-Contra Costa Transit Dist.,* 434 P.2d 982 (Cal. 1967) (publicly owned advertising space on buses "leased" to private advertising company).

nanced by public funds, provided no "mutual benefits" to the state, did not hold itself open for business to the public at large, and did not utilize "public property." Finally, the club did not exercise a "monopoly" over the supply of liquor, given "the availability of liquor from hotel, restaurant and retail licensees."[107] 92 S.Ct. at 1972-73.

Lloyd, involved a privately owned shopping center with a nondiscriminatory "policy, strictly enforced, against the distribution of handbills within the building complex." 92 S. Ct. at 2222. In ruling that anti-war leafletters could legitimately be excluded from the shopping center, the Court stressed several elements. First, unlike *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), the handbilling here had "no relationship . . . between the purpose of the expressive activity [opposing the War] and the business of the shopping center." 92 S.Ct. at 2226. Second, the public was invited only to shop in Lloyd Center, not to leaflet. Third, whereas the picketers in *Logan Valley* would have lost any "reasonable opportunity to convey their message to patrons of the Weis store had they been denied access to the shopping center," the leafletters could still reach Lloyd's customers as they entered from outside. 92 S.Ct. at 2227-28.

Each factor distinguishes *Lloyd* from the instant case. First, BEM does not seek to "enter" WTOP's facility for any nonbusiness purposes;[108] it asks only

[107] Unlike liquor, broadcast time is not fungible. WTOP provides a unique audience not available elsewhere. See Exhibit B.

[108] *Cf. Lloyd,* 92 S.Ct. at 2226. "The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used."

to purchase advertising time at established rates. Second, WTOP is exclusively a medium of communication, which sells to others only the opportunity to speak. And third, BEM has no "reasonable opportunity" to convey its message to WTOP's audience other than via WTOP itself. That audience, as WTOP admits, is unique. (Exhibit B.)[109]

Although their speech is fully protected under the First Amendment, licensees lack the freedom to discriminate which private newspapers may possess.[110] Chief Justice (then Judge) Burger has made this absolutely clear:

> [A] broadcaster is not . . . a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency. A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligation imposed by law. A broadcaster seeks and is granted free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened with enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty. *United Church of Christ, supra,* 359 F.2d at 1003.

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[109] Compare *Mosley, supra,* 92 S.Ct. at 2289, n. 1.

[110] See, *e.g., Associates & Aldrich Co.* v. *Times Mirror Co.,* 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Board* v. *Chicago Tribune,* 435 F.2d 470 (7th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971); *Resident Participation of Denver, Inc.* v. *Love,* 322 F.Supp. 1100 (D. Colo. 1971) (3 Judge District Court).

After five decades of operation, licensees apparently still have not learned that, unlike the appellant in *Moose Lodge, supra,* they are not operating a private club.

2. State action derives from the Commission's involvement in, and approval of, its licensees' flat ban against editorial advertisements.

The court below also found state action to derive from the Commission's approval of the editorial exclusion policies here in issue (App. 461-63). It noted that the Commission "specifically considered and specifically authorized the flat ban," and therefore gave "its imprimatur" to the exclusion on editorial advertising (App. 461). Because the Commission's decision would "inevitably provide guidance for future broadcaster action" (App. 461), the Commission itself supplied the requisite "state action."

The leading supportive precedent is *Public Utilities Commission* v. *Pollak,* 343 U.S. 451 (1952). In *Pollak,* the Court held that a local transit company, which was regulated by the Public Utilities Commission, had a "sufficiently close relation" (*Id.* at 462-63) with the Government to provide state action for First Amendment purposes.

The Court noted that the transit company was a public utility and exercised a "substantial monopoly of street, railway and bus transportation in the District of Columbia," (*Ibid*) but declined to rest its finding of state action on those criteria:

> We do, however, recognize that Capitol Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. [Footnote omitted.] We rely

> particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. 343 U.S. at 462.

Similarly, the F.C.C. here received "protests" from BEM and the DNC against the flat ban policies of WTOP and other licensees and, after formal consideration, "dismissed" the complaints on the ground that the "public interest, convenience, and necessity" was not "impaired" by the licensees' policies. This comprises affirmative Commission approval.[111]

State action in the present case is even clearer than *Pollak*. Broadcast licenses expire every three years. The Commission can renew upon finding the licensee's past programming has *affirmatively served* the "public interest." See 47 U.S.C. §§ 307(a), 309(a), (1964). The Commission is thus forced out of a position of neutrality by statute. The periodic issuance of

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[111] *Moose Lodge, supra,* specifically distinguished *Pollak* as follows: "Unlike the situation in *Public Utilities Commission* v. *Pollak* [citation omitted], where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory policies of Moose Lodge." 92 S.Ct. at 1973, n. 3.

Similarly, none of the cases cited by the broadcasters for the proposition that broadcasters are not governed by the First Amendment involve a regulatory approval of discriminatory policies. See, *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (First Cir., 1950); *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir., 1945); *Post* v. *Payton*, 323 F.Supp. 799 (E.D.N.Y. 1971). Moreover, none of those opinions contains thorough analysis of the law and we suggest that their dicta concerning state action is plainly erroneous.

operating authority over an exclusive three-year franchise clearly enhances "state action." [112]

3. State action derives from the power and importance of the broadcast medium, and one dedicated solely to communication.

In determining whether "state action" applies to private entities for First Amendment purposes, this Court has always looked to the nature of the property involved and its suitability for the type of communication in issue. *See, e.g., Marsh* v. *Alabama,* 326 U.S. 501, 504 (1946); *Logan Valley, supra.* Thus *Lloyd* stressed that:

> [t]the hand-billing by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used. 92 S.Ct. at 2226.
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> * * *
>
> . . . This Court has never held that a trespassor or an uninvited guest may exercise general rights of free speech on property privately owned and used non-discriminatorily *for private purposes only. Id.* at 2228.

Here, in contrast, we are dealing with property dedicated uniquely and solely to communication, indeed the very type of communication—i.e., advertising—which respondents seek to employ. Moreover, the underlying property, the airwaves, are not private but

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[112] See also *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), where the Court said: The Communications Act "does not restrict the Commission merely to supervision of [radio] traffic. It puts upon the Commission the *burden* of determining the *composition* of that traffic." *Id.* at 215. The Commission here cannot plead "neutrality." Given its statutory obligation to determine the composition of broadcast programming, its inaction comprises *approval.*

publicly owned and, as illustrated above, are being used discriminatorily.[113]

The signal importance of radio and television as a forum for communication was well put by petitioner ABC (Br. at 18):

> These cases highlight the critical role the broadcast media play in keeping contemporary American society adequately informed on important public issues. That broadcasting in general and electronic journalism in particular have become major sources of information to the American public is, therefore, an undeniable threshold premise.
>
> * * *

In sum, all of the necessary, indicia of "state action" for First Amendment purposes are abundantly present in the case of commercial broadcasters which refuse to sell advertising time to editorial advertisers. They operate a public, not a private, resource utilizing public property. There is extensive governmental regulation and involvement in their operations, making the government their "partner or . . . joint venturer" (*Moose Lodge, supra,* 92 S.Ct. at 1973). The government has specifically ratified the discriminatory policy in issue. And broadcasters operate a public forum unique in its ability to communicate views on public matters to mass audiences.

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[113] For full discussions of this issue, see App. 463, 399-402.

CONCLUSION

For the reasons above stated, the judgment of the court of appeals should be affirmed.

THOMAS R. ASHER
MEDIA ACCESS PROJECT
1910 N Street, N. W.
Washington, D.C. 20036

ALBERT H. KRAMER
CITIZENS COMMUNICATIONS CENTER
1812 N Street, N. W.
Washington, D.C. 20036

Attorneys for Business Executives Move for Vietnam Peace

Of Counsel:

STERN COMMUNITY LAW FIRM
2005 L Street, N. W.
Washington, D.C. 20036

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